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95-674

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

JAMES C. SATCHER,

Petitioner,

versus

HONDA MOTOR CO., LTD., AMERICAN HONDA MOTOR CO., INC., AND HONDA R & D CO., LTD.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a motion for new trial is the substantial equivalent of a motion for judgment notwithstanding the verdict (now motion for judgment as a matter of law) such that on appeal the movant of the former is entitled to receive the relief available under the latter?

2. Whether the lack of a consensus in the scientific, regulatory or industrial communities constitutes an absolute defense to the imposition of punitive damages for the callous, wanton, or grossly negligent manufacturer of an unreasonably dangerous product?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE CASE 1

REASONS WHY CERTIORARI SHOULD BE GRANTED 5

CONCLUSION 25

APPENDIX 1a

TABLE OF AUTHORITIES

Page

CASES

Baker v. Firestone Tire & Rubber Co., 793 F.2d 1196 (11th Cir. 1986) 14

Beck by Chain v. Thompson, 818 F.2d 1204 (5th Cir. 1987) 20

Bemer Aviation, Inc. v. Hughes Helicopter, Inc., 621 F.Supp. 290 (E.D. Pa. 1985), *aff'd.*, 802 F.2d 445 (3rd Cir. 1986) 17

BMW of North America, Inc. v. Gore, Docket No. 94-896, *cert. granted*, 115 S.Ct. 932, 130 L.Ed.2d 879 (1995) 11

Brown v. Bryan Country, OK, 53 F.3d 1410 (5th Cir. 1995) 12

Burke v. Deere & Co., 6 F.3d 497 (8th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1063, 127 L.Ed.2d 383 (1994) 25

Camacho v. Honda Motor Co., 741 P.2d 1240 (Colo. 1987), *cert. dismissed*, 485 U.S. 901, 108 S.Ct. 1067, 99 L.Ed.2d 229 (1988) 19

Campus Sweater Sportswear Co. v. M.B. Kahn Construction Co., 515 F.Supp. 64 (D.C. S.C. 1979), *aff'd.*, 644 F.2d 877 (4th Cir. 1981) 17

Carpenter v. Automobile Club Interinsurance Exchange, 58 F.3d 1296 (8th Cir. 1995) 12

Casper v. Barber & Ross Co., 288 F.2d 379 (D.C. Cir. 1961) 5

City of Greenville v. W.R. Grace & Co., 827 F.2d 975 (4th Cir. 1987) 14, 24

TABLE OF AUTHORITIES – Continued

Page

Dorsey v. Honda Motor Co., 655 F.2d 650 (5th Cir. 1981), *cert. denied*, 459 U.S. 880, 103 S.Ct. 177, 74 L.Ed.2d 145 (1982) 20

Dow v. Baird, 389 F.2d 882 (10th Cir. 1968) 7

Hansen v. Johns-Manville Corp., 734 F.2d 1036 (5th Cir. 1984), *cert. denied*, 470 U.S. 1051, 105 S.Ct. 1749, 84 L.Ed.2d 814 (1985) 15, 24

Hiltgen v. Sumrall, 47 F.3d 695 (5th Cir. 1995) 6

Honda Motor Co. v. Oberg, ___ U.S. ___, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994) 11

Hopkins v. Dow-Corning Corp., 33 F.3d 1116 (9th Cir. 1994), *cert. denied*, ___ U.S.___, 115 S.Ct. 734, 130 L.Ed.2d 637 (1995) 16

Jackson v. Johns-Manville Sales Corp., 781 F.2d 394 (5th Cir.), *cert. denied*, 478 U.S. 1022, 106 S.Ct. 3339, 92 L.Ed.2d 743 (1986) 12, 15, 24

Johnson v. New York, N.H. and H.R. Co., 344 U.S. 48, 73 S.Ct. 125, 976 L.Ed.77 (1952) 9

Marsh v. Illinois Central R. Co., 175 F.2d 498 (5th Cir. 1949) 5

Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 61 S.Ct. 189, 85 L.Ed. 147 (1940) 5

Moran v. Johns-Manville Corp., 691 F.2d 811 (6th Cir. 1982) 24

Moreno v. Consolidated Rail Corp., 63 F.3d 1404 (6th Cir. 1995) 12

Mosser v. Fruehauf Corp., 940 F.2d 77 (4th Cir. 1991) 14, 17

TABLE OF AUTHORITIES – Continued

Page

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991) 11

Peoples Bank & Trust Co. v. Cermack, 658 So.2d 1352 (Miss. 1995) 13

Renfro v. Swift Eckrich, Inc., 53 F.3d 1460 (8th Cir. 1995) 12

Sperry-New Holland v. Prestage, 617 So.2d 248 (Miss. 1993) 3, 4

Stafford v. Puro, 63 F.3d 1436 (7th Cir. 1995) 12

TXO Production Corp. v. Alliance Resource Corp., 509 U.S. ___, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993) 11, 24

United States E.E.O.C. v. AIC Sec. Investigations, Ltd., 55 F.3d 1276 (7th Cir. 1995) 7

United States for Use and Benefit of Weyerhaeuser Co. v. Bucon Const. Co., 430 F.2d 420 (5th Cir. 1970) 5

West v. Johnson & Johnson Products, Inc., 174 Cal.App.2d 831, 220 Cal.Rptr. 437 (6 Dist. 1985) 17

Wooderson v. Ortho Pharmaceutical Corp., 235 Kan. 387, 681 P.2d 1038 (1984) 17

STATUTES AND RULES

18 U.S.C. § 1332 1

28 U.S.C. § 1254(1) 1

Fed. Rule Civ. Pro. 50 7

Fed. Rule Civ. Pro. 50(b) 7

Sup. Ct. R. 10.1(a) and (c) 1

TABLE OF AUTHORITIES – Continued

Page

OTHER

2 M. Shapo, *The Law of Products Liability*, 29.02[3] (1990) 14

9A Wright & Miller, *Federal Practice and Procedure*, § 2531 (1995) 6

Gerald F. Tielz, *Strict Products Liability, Design Defects and Corporate Decision Making: Greater Deterrence Through Stricter Process*, 38 Vill. L. Rev. 1361 19

Ghiardi and Kircher, *Punitive Damage Recovery in Products Liability Cases*, 65 Marq. L. Rev. 1 (1981) 14

Leebron, *An Introduction to Products Liability: Origins, Issues and Trends*, 1990 Ann. Surv. Am. L. 395 (1991) 19

Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 Iowa L. Rev. 1 (1992) 18, 20, 23, 25

Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1258 (1976) 16

Schwarz, *The Role of Federal Safety Regulations in Products Liability Actions*, 41 Vand. L. Rev. 1121 (1988) 23

OPINIONS BELOW

Satcher v. Honda Motor Co., 52 F.3d 1311 (5th Cir. 1995)

Satcher v. Honda Motor Co., 855 F.Supp. 886 (S.D. Miss. 1994)

Satcher v. Honda Motor Co., 993 F.2d 56 (5th Cir. 1993)

Satcher v. Honda Motor Co., 984 F.2d 135 (5th Cir. 1993) (vacated)

Satcher v. Honda Motor Co., 758 F.Supp. 393 (S.D. Miss. 1991)

JURISDICTIONAL STATEMENT

This case was filed in the United States District Court for the Southern District of Mississippi based on the court's diversity jurisdiction pursuant to 18 U.S.C. § 1332. The United States Court of Appeals for the Fifth Circuit rendered its decision on May 30, 1995. The petitioner timely filed an application for panel rehearing on June 13, 1995, which was denied by the court on July 24, 1995. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rule 10.1(a) and (c).

STATEMENT OF THE CASE

James Satcher petitions this Court for a writ of certiorari in this case on the issue of the Fifth Circuit's dismissal of his claim for punitive damages against appellants, Honda Motor Co., Ltd., Honda Motor Co., Inc., and Honda R & D Co., Ltd. (collectively "Honda"). Satcher lost his leg when it was traumatically amputated

in a side-impact collision between the motorcycle on which he was riding and an automobile in which Satcher was completely free from fault. The motorcycle he was riding was a Honda Nighthawk. As early as 1969, Honda's own research and development studied crash bars, and concluded that "[t]hose crash bars that are currently on sale at auto accessory shops are effective in the protection of the rider's legs during a crash and angled collision; however, it has no protective effect or it has a possible reverse effect in broadside collisions." 19 R 32. Despite this negative, which was based entirely upon a misinterpretation of the test results,[1] the ultimate conclusion of the study was that enough promise was demonstrated to warrant more study and research. 19 R 33. Absolutely nothing was done over the more than twenty-five years to further the promise of the 1969 report. 21 R 27. The meager research that was done has been purely for the purpose of reporting negative results, which results have been used to foment controversy in the scientific community on the effectiveness of side-impact protection for the purpose of blocking federal legislation or regulation on the issue. *See* 19 R 51, 62, 122. As a result, while crash bars, which were first patented by Harley Davidson in 1934, are used on all police motorcycles, 19 R 24-25, they were not available to Satcher when he purchased his Nighthawk.

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[1] Dr. Ezra recalculated the tests results and concluded the "reverse impact" conclusion to be untrue. He found that the results indicated either no benefit, or a little added benefit, but no negative impact. 19 R 32.

Satcher sued Honda for strict products liability, negligence and breach of warranty under Mississippi law, seeking compensatory and punitive damages. A motion for directed verdict on the question of punitive damages was denied, and the case was put to the jury, which by general verdict found Honda liable and awarded $1,012,000.00 compensatory damages. The jury, in its discretion, also awarded two million dollars in punitive damages against Honda, a company with a net worth of almost seven billion dollars. 28 R 137; *see* 68a. Honda requested a new trial, but not a motion for judgment notwithstanding the verdict. *See* 70a *et seq.* This request was denied on the ground that more than sufficient evidence was presented to support the jury's verdict in all its particulars. *See* 57a *et seq.*

The United States Court of Appeals for the Fifth Circuit reversed, finding that the alleged defect in the motorcycle was "open and obvious" and therefore could not form the basis of a products liability, tort, or contract claim. *See* 50a-55a. Subsequently, on panel rehearing, the court vacated this decision and remanded the case for reconsideration in light of *Sperry-New Holland v. Prestage*, 617 So.2d 248 (Miss. 1993), a Mississippi Supreme Court decision which clarified that "open and obvious" was not an absolute defense to Mississippi products liability actions. *See* 47a-49a.

On remand, the district court reentered the jury's verdict, again denying Honda's request for judgment notwithstanding the verdict and new trial. It first found that Honda could not ask for a judgment notwithstanding the verdict because "defendants filed no motion for judgment notwithstanding the verdict on any ground, until after remand," and that the court did not "understand or interpret [Honda's motion for new trial] to be a request for a judgment notwithstanding the verdict" because "the

defendants never so stated that to the Court nor was it addressed by the Court." *See* 35a-36a. The district court found that Honda was not entitled to a new trial because *Sperry-New Holland* squarely held that "open and obvious" was not an absolute defense under Mississippi products liability law, and that the jury was correctly instructed as to Mississippi products liability law via jury instructions requested by Honda. *See* 44a.

On appeal, the Fifth Circuit affirmed the district court's finding that Honda was not entitled to a new trial on the question of liability for the compensatory damage award. But, despite the fact that it was not requested by post-trial motion, the court found that Honda was entitled to judgment notwithstanding the verdict on the question of punitive damages. The court found that a motion for new trial, which raised the question of sufficiency of evidence, was sufficient to authorize the court to enter judgment in Honda's favor, rather than grant a new trial on the question, because at most "Honda's noncompliance with [Rule 50] was little more than failing to style its motion correctly." *See* 8a. The court then examined the evidence in the light most favorable to Honda, and found that "no reasonable jury could conclude under Mississippi law that this is an 'extreme case' meriting punitive damages, or that Honda's conduct rose to the level of 'malice, ruthless disregard or gross negligence' required for the imposition of such damages." *See* 13a. The basis for this conclusion was the fact that there is no scientific, government or industry consensus as to the fact that motorcycle manufacturers ought to offer leg protective devices to the purchasers of their products, and that

motorcycle manufacturers, including Honda, have not seen fit to offer such devices before. *See id.*

REASONS WHY CERTIORARI SHOULD BE GRANTED

I. The Fifth Circuit's holding that a motion for new trial is nothing more than a misnamed motion for judgment notwithstanding the verdict is contrary to the jurisprudence of this Court and other circuit courts.

The motion for new trial and the motion for judgment notwithstanding the verdict (now judgment as a matter of law) each have their "own office." *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 250, 61 S.Ct. 189, 194, 85 L.Ed. 147 (1940). See also *Casper v. Barber & Ross Co.*, 288 F.2d 379, 383 (D.C. Cir. 1961) ("The motion for judgment notwithstanding the verdict and the motion for new trial have different and peculiar offices."), and *Marsh v. Illinois Central R. Co.*, 175 F.2d 498 (5th Cir. 1949) ("The motion for new trial is entirely independent of [the motion for judgment notwithstanding the verdict] and is governed by different principles and has a different result. . . . [E]ach is entitled to be decided according to the principles applicable to it without confusing them."), both citing *Montgomery Ward & Co. v. Duncan, supra. Accord United States for Use and Benefit of Weyerhaeuser Co. v. Bucon Const. Co.*, 430 F.2d 420, 423 (5th Cir. 1970) ("the distinction above stated between a motion for a directed verdict or for judgment j.n.o.v. on the one hand and a motion for a new trial on the other was firmly embedded

in the common law and has long been recognized by the decisions of this court and other national courts.").

A motion for a judgment as a matter of law and a motion for a new trial have "wholly distinct functions and entirely different standards govern their allowance." 9A Wright & Miller, *Federal Practice and Procedure*, § 2531 (1995). If a motion for a new trial is granted, the case is tried again. In contrast, if a judge enters a judgment as a matter of law, the case is ended in the trial court, and for this reason, it is natural that it be measured by a "far more rigorous standard." *Id.*[2]

Thus, it has been squarely held by at least one circuit that an appellant who has failed to move for judgment notwithstanding the verdict is not entitled to obtain the same on appeal, despite the fact that he or she did move for new trial:

> The only post-judgment motion of the defendants here was a motion for new trial which cannot be construed as the equivalent of a motion for judgment notwithstanding the verdict under Rule 50(b), supra, or a motion for relief from a judgment under Rule 60(b), supra. Although under Rule 60(b) motions for new trial

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[2] On appeal the difference between the two motions is also quite clear. An appellate court reviewing a denial of a judgment as a matter of law must uphold the jury verdict unless "there is no legally sufficient evidentiary basis for a reasonable jury to find" as the jury did. *Hiltgen v. Sumrall*, 47 F.3d 695, 700 (5th Cir. 1995). A review of the district court's denial of a motion for a new trial, on the other hand, "is more deferential." *Id.* at 703. The appellate court will reverse the district court only when there is a clear showing of an abuse of judicial discretion. *Id.*

> may be joined with motions for judgment notwithstanding the verdict, nevertheless the motions serve quite different purposes and seek entirely different ends. The motions cannot be treated as interchangeable.

Dow v. Baird, 389 F.2d 882, 884 (10th Cir. 1968).

The 1991 revision to Federal Rule of Civil Procedure 50, which replaces the previous motion for judgment notwithstanding the verdict with the motion for judgment as a matter of law, but retains the requirement that challenges to the sufficiency of the evidence be raised at the close of evidence and post-judgment in order to preserve the right to appellate review, is even more explicit. The present rule requires that the motion for judgment as a matter of law "specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment." Fed. Rule Civ. Pro. 50(b). This verbiage was included to "alter the result in cases in which courts have used various techniques to avoid the requirement that a motion for directed verdict be made as a predicate to a motion for judgment notwithstanding the verdict," and has therefore "welded shut" the previously existing "escape hatch[es] employed the litigants and the courts to escape Rule 50. *United States E.E.O.C. v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1287 (7th Cir. 1995), quoting Advisory Committee note to Fed. Rule Civ. Pro. 50.

The Fifth Circuit has held, contrary to pre-existing jurisprudence and Federal Rule of Civil Procedure 50, that a judgment as a matter of law can be granted on appeal even though it was not requested below. It held that Honda's failure to preserve the issue in the trial

court was nothing more than a technical failure to correctly title its motion for new trial. But, Honda's motion did not ask for the district court to enter judgment as a matter of law in its favor based upon the fact that the evidence was insufficient to support the jury's verdict. Instead, Honda asked the district court to exercise its discretion and grant Honda a retrial on the ground that the judgment was against the weight of the evidence. *See* 71a.[3] The district court was not confused about the

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[3] The exact substance of the motion was as follows:

MOTION FOR NEW TRIAL

COME NOW the Defendants . . . and pursuant to Rule 59 of the Federal Rules of Civil Procedure, move the court for a new trial and in support thereof would show unto the Court the following, to wit:

* * *

III.

Said verdict and Judgment should be set aside and a new trial granted to Honda based upon the following grounds:

A. The verdict and Judgment were against the weight of the credible evidence.

* * *

2. Plaintiff's claim for punitive damages should not have been submitted to the jury because there was no evidence from which a fair minded jury could have concluded that Honda acted with gross negligence or willful misconduct in designing, selling or marketing the motorcycle purchased by Plaintiff as required by Mississippi law.

* * *

import of Honda's request. It stated that "defendants filed no motion for judgment notwithstanding the verdict on any ground, until after remand," that "the record is clear that the defendants did not request a judgment notwithstanding the verdict in their Motion for New Trial, or at any other time, until after remand of this case," and that the court did not "understand or interpret [Honda's motion for new trial] to be a request for a judgment notwithstanding the verdict" because "the defendants never so stated that to the Court nor was it addressed by the Court." *See* 35a-36a.

Accordingly, the Fifth Circuit's explanation that Honda obviously intended to request a judgment notwithstanding the verdict is a thin reed. Indeed, this Court expressly rejected reliance on such unexpressed intentions to excuse compliance with Rule 50 in *Johnson v. New York, N.H. and H.R. Co.*, 344 U.S. 48, 73 S.Ct. 125, 976 L.Ed.77 (1952):

> Although this respondent made several motions it did not as the rule requires move within ten days after verdict "to have judgment entered in accordance with his (its) motion for a directed verdict." We are told, however, in respondent's brief that its motion to set aside the verdict "was

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> C. The Court erred in instructing the jury in the following respects:
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> * * *
>
> 1. The Court erroneously instructed the jury that they (sic) could award punitive damages against Honda.

See 70a 71a, 74a. The motion did not conclude with a prayer for relief. *See* 81a.

> intended to be a motion for judgment in its favor or for a new trial" and that "obviously respondent did not merely want the verdict to be set aside but wanted the relief that invariably follows such a setting aside on the grounds urged: a judgment in its favor or a new trial. The defect in this argument is that respondent's motions cannot be measured by its unexpressed intention or wants. Neither the trial judge nor the Court of Appeals appears to have treated the motion to set aside the verdict as asking for anything but that. And surely petitioner is not to have her opportunity to remedy any shortcomings in her case jeopardized by a failure to fathom the unspoken hopes of respondent's counsel. Respondent's motion should be treated as nothing but what it actually was, one to set aside the verdict – not one to enter judgment notwithstanding the verdict.

344 U.S. at 127; 73 S.Ct. at 127.

There was no justification for the Fifth Circuit's departure from well-established precedent, or its alteration of the rules of appellate review to excuse Honda's waiver of the issue in order to grant judgment as a matter of law. This Court should grant certiorari to ensure that the Fifth Circuit, and other circuit courts of appeals, do not repeat this error.

II. The Fifth Circuit's holding that the lack of industry, peer or government consensus on the desirability of an alleged safety feature prevents a jury as a matter of law from awarding punitive damages is contrary to the jurisprudence of other circuit courts, the jurisprudence of Mississippi applicable in this diversity case, and constitutes bad policy and precedent.

Concern about the jury's vast discretion with regard to the amount of punitive damages which might be awarded to a plaintiff, and the extreme size of such awards in certain cases, has led this Court into an examination of the constitutional constraints on the magnitude of these penalties and the manner in which they are assessed. *See Honda Motor Co. v. Oberg*, ___ U.S. ___, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994); *TXO Production Corp. v. Alliance Resources*, 509 U.S. ___, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991). Indeed, this Court's reflection on these questions is still ongoing, because this term it has under consideration the case of *BMW of North America, Inc. v. Gore*, Docket No. 94-896, *cert. granted*, 115 S.Ct. 932, 130 L.Ed.2d 879 (1995).

Faced with this Court's guidance that the constitutional limits are not as severe as they might desire, foes of punitive damage awards have turned elsewhere. Legislative "solutions" have been proposed and debated. Additionally, alternative methods of judicial control over punitive damage awards have been sought. One such alternative is the vehicle of judgment as a matter of law, which concerns the determination of the circumstances upon which a jury may award punitive damages *ab initio*

rather than the size of the award, the latter of which has been the heretofore exclusive focus of this Court's recent inquiry.

Up to now, those who have sought to obtain more stringent review of punitive damage awards through the judgment as a matter of law have, by and large, not met with much success. A survey of the most recent cases which have involved challenges to the sufficiency of evidence supporting a punitive damage award reveals that the circuit courts of appeals have not articulated a litmus test of factors which would allow such awards or which would, when not met, compel a conclusion that a defendant is immune from liability for punitive damages as a matter of law. In particular, the amorphous standard of "conscious indifference" to potential detrimental consequences, as determined by the jury from all of the available circumstances of a particular case, has been found sufficient to justify an award of punitive damages. *See e.g., Renfro v. Swift Eckrich, Inc.*, 53 F.3d 1460 (8th Cir. 1995); *Carpenter v. Automobile Club Interinsurance Exchange*, 58 F.3d 1296 (8th Cir. 1995); *Brown v. Bryan Country, OK*, 53 F.3d 1410 (5th Cir. 1995); *Stafford v. Puro*, 63 F.3d 1436 (7th Cir. 1995); *Moreno v. Consolidated Rail Corp.*, 63 F.3d 1404 (6th Cir. 1995).

Nor have state courts found it necessary to elevate the grant of punitive damage awards to a matter of law by subjecting jury verdicts which include this element of relief to stricter scrutiny. In particular, the Mississippi Supreme Court, whose rulings control the disposition of the instant diversity jurisdiction action, "has expressed a great reluctance to interfere with punitive damages assessments made by a jury." *Jackson v. Johns-Manville*

Sales Corp., 781 F.2d 394, 408 n.17 (5th Cir.), *cert. denied*, 478 U.S. 1022, 106 S.Ct. 3339, 92 L.Ed.2d 743 (1986). *See also Peoples Bank & Trust Co. v. Cermack*, 658 So.2d 1352, 1361 (Miss. 1995) ("The award of punitive damages along with the amount of such, are within the discretion of the trier of fact.").

The Fifth Circuit's reversal of the jury's award of punitive damages to Satcher represents a dramatic new approach to judicial control over jury discretion in the award of punitive damages. This new course is neither compelled nor allowed by federal or Mississippi law. In fact, it is contrary to both, and in disagreement with established precedent. Moreover, the Fifth Circuit's rule sets a dangerous precedent, one that will be capitalized upon by defendants to demand, and receive, protection from punitive damages in almost every products liability case, because it allows defendants to escape punitive damages as a matter of law upon demonstration of mere disagreement in the scientific community as to whether the defendant's conduct was reasonable, without giving the jury the discretion to evaluate the credibility of the defendant's proof even when the defendant has created and is responsible for the disagreement. Moreover, the Fifth Circuit's decision leaves no room for a finding that the existence of a disagreement gives rise to a duty for the defendant to act by further testing and research, the breach of which may be callous and/or reckless under the circumstances.

While there appear to be no Mississippi cases which have addressed the issue, the law nationwide (and Mississippi appears to be no exception) uniformly provides that evidence of a defendant's knowledge of a significant

danger created by its product, coupled with a failure to appropriately respond to that knowledge, can demonstrate, **in and of itself**, the kind of callous or reckless disregard that will justify the imposition of punitive damages.

> Terms such as "wanton" and "reckless" are among the laws' most indeterminate. However, some consensus has emerged on the minimum requirements necessary to support an award of punitive damages in products liability cases. One leading scholar notes that two elements must combine for a punitive damage award in such cases: 1) "defendant's knowledge of a product defect and of the potential harm which that defect posed to consumers," and (2) "some kind of 'fault,' consisting of a defendant failing to take some action which the products marketing circumstances demanded." 2 M. Shapo, *The Law of Products Liability*, 29.02[3] (1990) quoting Ghiardi and Kircher, *Punitive Damage Recovery in Products Liability Cases*, 65 Marq. L. Rev. 1, 83-84 (1981).
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> * * *
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> Knowledge of the defect and conscious indifference to its danger are thus the critical factors separating recklessness from negligence.

Mosser v. Fruehauf Corp., 940 F.2d 77, 84 (4th Cir. 1991). Where the danger is well known and extremely great, sale of a product without a warning of the danger in and of itself may demonstrate the requisite recklessness. *Id.*, citing *Baker v. Firestone Tire & Rubber Co.*, 793 F.2d 1196, 1200 (11th Cir. 1986); *City of Greenville v. W.R. Grace & Co.*, 827 F.2d 975, 983 (4th Cir. 1987).

These rules have been applied to find that manufacturers of asbestos were liable for punitive damages, despite evidence that there was less than a scientific consensus on the dangers of the product. It found that reviewing the record in the light most favorable to the plaintiff left "no room for doubt that the jury had an adequate basis for concluding that the defendants had shown gross disregard" for the plaintiff's rights. *Jackson v. Johns-Manville Sales Corp., supra,* 781 F.2d at 408. There was evidence from which the jury could have inferred that the manufacturer had known for decades about the dangers involved in the use of asbestos, that it had directed its doctors not to participate in programs where they might learn more about the dangers of asbestos, and that its staff had been instructed that the "less said [about asbestosis] the better." *Id.* at 404 n.12.

The same result was reached in *Hansen v. Johns-Manville Corp.*, 734 F.2d 1036 (5th Cir. 1984), *cert. denied*, 470 U.S. 1051, 105 S.Ct. 1749, 84 L.Ed.2d 814 (1985).

> Hansen presented the testimony of Dr. Smith, a former medical officer of Johns-Manville. Dr. Smith testified that he **informed Johns-Manville of the hazards asbestos** presented to asbestos insulation workers and recommended placing warnings on insulation products as early as the 1940's, but that **Johns-Manville did not act on his recommendations.** We believe that this evidence is sufficient to present a jury question. If the jury believed the testimony of Dr. Smith, they could reasonably find that Johns-Manville had been grossly negligent in failing to warn Hansen of the dangers related to

> its products. It is the function of the jury, not the court, to determine the credibility of witnesses.

734 F.2d at 1043.

Likewise, in breast implant litigation, it has been held that the manufacturer's mere suspicion of danger, if not acted upon through further research, in and of itself, could justify punitive damages:

> Given the fact that Dow was aware of the possible defects in its implants, that Dow knew that long-term studies of the implants' safety were needed, that Dow concealed this information as well as the negative results of the few short-term laboratory tests performed, and that Dow continued for several years to market its implants as safe despite this knowledge, a substantial punitive damages award is justified.

Hopkins v. Dow-Corning Corp., 33 F.3d 1116, 1127 (9th Cir. 1994), *cert. denied*, ___ U.S.___, 115 S.Ct. 734, 130 L.Ed.2d 637 (1995).

Thus, where the danger is known, the defendant's failure to do further research can demonstrate wantonness:

> It is plain that the question of when failure to test would suffice to support a punitive award cannot be answered in the abstract. Factors relevant to the reasonableness of any failure to test would include the reasons to conduct the test, the expense of testing procedures, and the likelihood that testing would provide useful information. See Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1258, 1340-1344 (1976).

* * *

> Many cases from other jurisdictions upholding punitive awards based in part on a failure to test involved aggravating circumstances including, significantly, **the manufacturer's failure to act in the face of notice or knowledge of a defect.** *See e.g., Bemer Aviation, Inc. v. Hughes Helicopter, Inc.*, 621 F.Supp. 290, 299 (E.D. Pa. 1985), *aff'd.*, 802 F.2d 445 (3rd Cir. 1986); *Campus Sweater Sportswear Co. v. M.B. Kahn Construction Co.*, 515 F.Supp. 64, 104 (D.C.S.C. 1979), *aff'd.*, 644 F.2d 877 (4th Cir. 1981); *West v. Johnson & Johnson Products, Inc.*, 174 Cal.App.2d 831, 220 Cal.Rptr. 437, 460 (6 Dist. 1985); *Wooderson v. Ortho Pharmaceutical Corp.*, 235 Kan. 387, 681 P.2d 1038, 1064 (1984). As one court has explained:
>
> > The analogy can be drawn to a mechanic who fails to test the brakes on a car. Assuming that the examination should have been conducted, the mechanic is negligent but not liable for punitive damages unless it can be shown that he or she knew or had reason to know that the brakes were faulty and thus a substantial likelihood existed that the brakes would fail and result in great bodily harm.

Mosser v. Fruehauf Corp., supra, 940 F.2d at 86-87 (emphasis added).

A recent law review article that reports the results of a nationwide survey of punitive damage cases (and dispels many of the insurance company myths propagated in an effort to secure judicial and legislative relief) reports the following:

> The most common "smoking guns" evidencing outrageous conduct were field **testing reports showing dangers**, prior consumer complaints, prior lawsuits, **corporate awareness of epidemiological evidence of a danger or risk**, and sacrificing public safety for profits. * * * * David Owen's path breaking law review article identified five recurrent types of corporate misconduct that resulted in punitive damages awards in cases he examined: (1) fraudulent-type misconduct; (2) knowing violations of safety standards; (3) **inadequate testing and manufacturing procedures**; (4) failure to warn of known dangerous before marketing; and (5) post-marketing failure to remedy known dangers."

Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data* (1992), 78 Iowa L. Rev. 1, 64-65 (emphasis added). Indeed, "[i]nadequate testing and quality control of products was alleged as the central issue in twelve percent (forty-four) of the cases," with the Dalkon Shield litigation was listed as the "paradigmatic example of inadequate testing." *Id.* at 70. Another example was the removal of sale from soy-derived baby formula, that resulted in thousands of infants suffering permanent brain damage. Punitive damages were awarded because the manufacturer never tested to see if the extraction was safe, although it offered to justify its conduct on the ground that the sale was removed in order to prevent high blood pressure. *Id.* at 71.

It is precisely the knowledge of significant danger, combined with the failure to act on that knowledge by implementing additional testing or design improvements,

that has compelled courts nationwide to impose punitive damages against vehicle and, in particular, motorcycle, manufacturers, and which has resulted in some improvements in automotive and motorcycle safety, according to the commentators.

> Passenger-car, truck, school bus and motorcycle cases provide dramatic instances of design defects chosen deliberately, and consciously in disregard of user safety.
>
> * * *
>
> Honda's own testing – which occurred almost 10 years before a user of a Honda motorcycle was injured – indicated the safety value of protective bars on motorcycles, yet Honda failed to incorporate such a feature into the design of its consumer motorcycles. Although Honda did not incorporate protective bars on motorcycles manufactured and sold commercially in the United States, it did offer optional "bumpers" on motorcycles sold to police agencies in Japan.

Gerald F. Tielz, *Strict Products Liability, Design Defects and Corporate Decision Making: Greater Deterrence Through Stricter Process*, 38 Vill. L. Rev. 1361, text at and note 94 (1993), citing *Camacho v. Honda Motor Co.*, 741 P.2d 1240, 1242 (Colo. 1987), *cert. dismissed*, 485 U.S. 901, 108 S.Ct. 1067, 99 L.Ed.2d 229 (1988). *See also* Leebron, *An Introduction to Products Liability: Origins, Issues and Trends*, 1990 Ann. Surv. Am. L. 395, 405, 458 at note 49 (1991) ("[S]everal courts have upheld plaintiff's claims that motorcycles were defectively designed because they failed to contain adequate leg or other guards to prevent injury."). The Iowa Law Review study specifically listed the "incorporation of side protection tests" as an example

of a safety improvement to motorcycles directly spawned by the quest for punitive damages for the industry's "failure to follow DOT-recommended side-protection." *In Defense of Punitive Damages*, 78 Iowa L. Rev., *supra*, at 80. Under such findings, it is difficult to understand how the Fifth Circuit could set aside this jury's finding as unreasonable.

Moreover, a manufacturer is not allowed to sit back and do nothing simply because there is not a ground swell of action in the field, as evidenced by the promulgation of safety regulations. "Compliance with minimum safety regulations does not excuse unreasonable conduct where a reasonable man would take additional precaution." *Beck by Chain v. Thompson*, 818 F.2d 1204, 1212 (5th Cir. 1987).

> Generally speaking, compliance with regulatory standards may be admissible on the issue of care, but does not require a jury to find a defendant's conduct reasonable. Honda offers no persuasive reason why compliance will as a matter of law be . . . an absolute defense of whether its conduct is willful, reckless, or outrageous.

Dorsey v. Honda Motor Co., 655 F.2d 650, 657 (5th Cir. 1981), *cert. denied*, 459 U.S. 880, 103 S.Ct. 177, 74 L.Ed.2d 145 (1982) (citations omitted).

The Fifth Circuit's decision is impossible to harmonize with this avalanche of precedent. The court held that the fact that consensus does not exist on the question of motorcycle leg protection in and of itself prevents a jury finding the failure to offer leg protection to be wanton or reckless, despite evidence that, as early as 1969, Honda's own study on the subject reported promise and that

Honda had never in the intervening years conducted any further research to resolve the issue, even though its study called for further research.[4] While the court of appeal found this evidence inconsequential, the district court found it compelling. In denying Honda's first request for directed verdict made at the close of the plaintiff's case, the court specifically referred to a 1967 Honda film, which stated that there was a need for further study, and the evidence which showed that Honda did no more studies and research since that time. *See* 22 R 136. This, in and of itself, under uniform nationwide case law, was sufficient to demonstrate the "recklessness" that

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[4] The evidence presented to the jury suggested a possible motive for Honda's failure to act on its own recommendation, which motive is the very height of recklessness and wantonness. A Denver Research Institute study commissioned by the Department Transportation concluded that "[a]ny safety standards of regulations which tend to change motorcycles from high performance of sporting or racy vehicles into basic transportation machines have, in the past and will almost certainly in the future, meet concerted effective opposition from the sporting and racing motorcycles lobby. The campaign against helmet laws and the ridicule of the 80 MPH now required speedometer are indicative of the attitudes of some people in these areas. Whether these people have a right, which they often claim 'to kill or cripple myself if I want to' is certainly a debatable issue considering the societal costs which results from such events. However, this debate has been going on for at least 10 years and even federal and state legislators, who should have better judgment, have not been able to withstand the pressures asserted by the sporting racing motorcycle lobby." D-37. This lobby is not beyond using purportedly unbiased institutions, like the Society of Automotive Engineers, to propagandize its case. The SAC's committees whose key positions are filled by industry representatives, who do a "very good job" of preventing recommendations for regulation. 19 R 122.

would justify an award of punitive damages. At the close of all the evidence, Honda's second request for directed verdict was denied by reference to the evidence from which the jury could infer that the *only* two independent studies that were not funded by the motorcycle industry indicated that leg protector devices should be put on motorcycles. *See* 28 R 128. As the district court concluded, if the jury determined that plaintiff's experts were telling the truth, the jury could award punitive damages. *See* 28 R 129. In denying Honda's request for a new trial, the district court found that "substantial" evidence existed to support the jury's verdict "on all issues." *See* 57a.

The Fifth Circuit's decision that a manufacturer is not liable "as a matter of law" when it can demonstrate that there is a disagreement or no consensus in the industry, and no government regulation is the *only* decision of this kind in the nation – Satcher's counsel, after exhaustive searches on Westlaw in every nationwide database, could find nothing even remotely comparable. Instead, the rule nationwide is that a jury is free to impose punitive damages when there is proof of the manufacturer's knowledge of danger and a failure to appropriately respond. One method of response may, under the circumstances, be further testing and research. If the manufacturer does nothing, this inaction may, in and of itself, be sufficient ground for a finding of reckless disregard. Any other rule gives manufacturers an incentive to foment "disagreement" and pressure government regulators into inaction, rather than to honestly and forthrightly try to resolve the

safety issues with which they are confronted when knowledge of a significant risk arises.[5]

It is frightening to think that, under the Fifth Circuit's holding, manufacturers can and will escape liability for reckless conduct by merely demonstrating that a disagreement exists, regardless of the role they might have played in the creation of the disagreement or their total failure to contribute to the scientific research in an effort to resolve the dispute. One need only consider the "research" that still bellows out (funded by the tobacco industry), that continues to conclude that there is no danger in cigarette smoking, and the fact that a "consensus" on the issue was only reached late in the history of the activity, in order to imagine in what direction the fertile ground planted by the court of appeal's decision will be plowed. Asbestos manufacturers demonstrated that lack of a "consensus" about the health effects of their products for years, but courts have uniformly held them liable for punitive damages because of the suspicions that

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[5] The danger of this result is evident. One study revealed that fifty-two percent of the commissioners appointed to nine federal agencies in the mid-1970's came from the industries those agencies regulated. *In Defense of Punitive Damages*, 78 Iowa L.Rev., *supra* at 75. "Courts also may find that the manufacturer's conduct undermined the effectiveness of the agency's product safety standards, as for example, when a manufacturer withholds vital information from the regulatory agency . . . ." Schwarz, *The Role of Federal Safety Regulations in Products Liability Actions*, 41 Vand.L.Rev. 1121, 1142 (1988). The NHTSA has been listed as an example of a regulatory body that has been captured by industry influence and has therefore "failed to address a range of issues that would save thousands of lives." *Id.* at 1156.

the product was dangerous and their failure to confirm the suspicions through further testing. *See Hansen v. Johns-Manville Corp., supra; Jackson v. Johns-Manville Sales Corp.; Moran v. Johns-Manville Corp.*, 691 F.2d 811, 814 (6th Cir. 1982). *See also City of Greenville v. W.R. Grace & Co., supra.* The "lack of a consensus" defense recognized by the Fifth Circuit would have allowed the asbestos manufacturers, the Dalkon Shield and breast implant manufacturers to escape punitive damages, and will no doubt be invoked by the cigarette manufacturers and every other product liability defendant because there are few, if any, products which are universally recognized as dangerous, except those that are already regulated by the federal or state governments.

There are those who would argue that tight judicial reins on punitive damages are warranted, given the disruptive effect they have been alleged to cause on business. In this regard, the Fifth Circuit's decision is not unique, as it is similar to an opinion of the Eighth Circuit which caused Judge Heaney to observe the following:

> The majority's opinion appears to manifest a distaste for punitive damages generally. I note for the record that such awards, firmly rooted in our common law for well over a century, are perfectly proper in an appropriate case and offend neither Iowa law nor the United States Constitution. *See, e.g., TXO Production Corp. v. Alliance Resource Corp.*, 509 U.S. ___, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993). Recent empirical study, moreover, has debunked the mythology of "skyrocketing awards," "runaway juries," and "competitive disadvantage" too often erroneously associated with such awards. *See, e.g.,*

Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 Iowa L.R. 1 (1992).

Burke v. Deere & Co., 6 F.3d 497, 516 n.4 (8th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1063, 127 L.Ed.2d 383 (1994), Heaney, J., dissenting.

CONCLUSION

Satcher respectfully requests that this Court grant its petition for writ of certiorari in this matter, and that the verdict of the jury awarding him punitive damages be reinstated. The evidence presented at trial (Honda's knowledge and its failure to follow its own recommendation for more research in the face of the gravity of the risk and the relatively minor costs associated with product improvement) were more than sufficient upon which the jury could reasonably determine that Honda's conduct was wanton, callous or reckless.

This case offers this Court the opportunity to expand the focus of its consideration of punitive damages to include the question of when a defendant may escape such damages as a matter of law. It is suggested that the answer to this inquiry is one which should be supplied by the legislature, not the courts. Here, the Fifth Circuit has held that the mere existence of disagreement in the scientific, business or regulatory communities (regardless of the defendant's conscious indifference to the magnitude of the potential risk) is sufficient to create immunity from punitive damages. Relator can find no other court which has ever reached this conclusion. The legality of

the defense offered by the Fifth Circuit's holding should be thoroughly tested now by this Court, before the blueprint offered by the court's holding takes root and becomes firmly entrenched as a matter of routine defense strategy.

Respectfully submitted,

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APPENDIX

James C. SATCHER, Plaintiff-Appellee,

v.

HONDA MOTOR COMPANY, et al., Defendants-Appellants.

No. 94-60492.

United States Court of Appeals,
Fifth Circuit.

May 30, 1995.

Appeal from the United States District Court for the Southern District of Mississippi.

Before POLITZ, Chief Judge, REAVLEY and BARKSDALE, Circuit Judges.

REAVLEY, Circuit Judge:

The manufacturer and seller of Honda motorcycles appeal for the second time[1] a judgment in favor of a rider who lost his leg in a collision between his motorcycle and an automobile. His vehicle had no leg guards, an omission that plaintiff Satcher claims made the product defective and unreasonably dangerous in a crash. The district court's judgment enforces a jury verdict. We vacate the award of punitive damages and otherwise affirm.

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[1] *Satcher v. Honda Motor Co.*, 984 F.2d 135 (5th Cir.) (reversing and rendering in favor of Honda), *vacated*, 993 F.2d 56 (5th Cir.1993) (on petition for rehearing remanding to district court).

BACKGROUND

Satcher sued three Honda companies (collectively Honda) and obtained a favorable jury verdict awarding him approximately $1 million in actual damages and $2 million in punitive damages. In the first appeal we held that under Mississippi law the recovery was barred because the alleged defect, the lack of leg guards, was open and obvious to the ordinary consumer. We reversed and rendered, reasoning that the case should have never gone to the jury and that the district court should have granted defendants' motion for summary judgment.

A few months after our first opinion, however, the Mississippi Supreme Court made clear that the Fifth Circuit's rule, that an open and obvious product defect could not be a ground for liability, was not Mississippi law. The Mississippi Legislature also enacted a new statute bearing on product liability. On rehearing, we vacated the prior opinion and remanded the case to the district court to address these new developments in Mississippi law.

The Mississippi case in question is *Sperry-New Holland v. Prestage*, 617 So.2d 248 (Miss.1993). The court there approved a risk-utility analysis in products cases, and held that the trial court had not erred in applying that analysis rather than a consumer expectations analysis. The critical distinction for our purposes is that even if the dangerousness of the product is obvious to a reasonable consumer, the plaintiff can still recover in some cases:

> In a "risk-utility" analysis, a product is "unreasonably dangerous" if a reasonable person would conclude that the danger-in-fact, whether foreseeable or not, outweighs the utility

> of the product. Thus, even if a plaintiff appreciates the danger of a product, he can still recover for any injury resulting from that danger provided that the utility of the product is outweighed by the danger that the product creates. Under the "risk-utility" test, either the judge or the jury can balance the utility and danger-in-fact, or risk, of the product.

Id. at 254. The court further made clear that the "patent danger" or "open and obvious" bar to recovery in products cases is not to be followed in Mississippi:

> Under the "patent danger" rule, "a product that has an open and obvious danger is not more dangerous than contemplated by the consumer, and hence cannot, under the consumer expectation test applied in Mississippi, be unreasonably dangerous." *Toney [v. Kawasaki Heavy Industries, Ltd.]* 975 F.2d [162] at 165 [(5th Cir.1992)] (quoting *Melton*, 887 F.2d at 1243).
>
> Having here reiterated this Court's adoption of a "risk-utility" analysis for products liability cases, we hold, necessarily, that the "patent danger" bar is no longer applicable in Mississippi. Under a "risk-utility" analysis, the "patent danger" rule does not apply. In "risk-utility," the openness and obviousness of a product's design is simply a factor to consider in determining whether a product is unreasonably dangerous.

Id. at 256 n. 4. The court further held that Fifth Circuit cases applying the consumer expectations test had incorrectly applied Mississippi law. *Id.* at 256.[2]

The district court subsequently responded with a carefully written Memorandum Opinion and Order on Remand. The court pointed out that the new statute, MISS.CODE ANN. § 11-1-63, § 11-1-65, did not become effective until July 1, 1993 (procedural) and July 1, 1994 (substantive), too late to have any effect on the 1991 trial of the Satcher case. Moving to *Prestage*, the district court read that decision to fault the Fifth Circuit's view of Mississippi law but not to fault the trial court's submission in this case. While a risk-utility analysis would have been appropriate under *Prestage*, the defendant here requested the consumer expectations instruction that was given and the jury returned a verdict of unreasonable dangerousness. There being no error and no manifest injustice, the judgment was again entered on the verdict.

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[2] Some federal judges have had difficulty understanding Mississippi products liability law, including the meaning of comment i of the Restatement (Second) of Torts § 402A (re "consumer expectations"). *See Melton v. Deere & Co.*, 887 F.2d 1241, 1246 (5th Cir.1989) (Reavley, J., dissenting). No Mississippi law controlling this case is "in its infancy," as the dissent characterizes risk-utility submission.

As we emphasize below, the jury has found the product without leg guards to be unreasonably dangerous, and has also found that the ordinary consumer would not appreciate the danger. The majority will not speculate about what a new jury would decide, but we are convinced that Mississippi courts would find nothing in this record to justify ordering plaintiff to retry his case ten years after his injury.

DISCUSSION

A. *The Impact of Prestage.*

Honda argues that *Prestage* altered the analysis used in products cases, changing the focus away from consumer expectations for the product to whether the danger outweighs the utility of the product. Honda contends that the open and obvious nature of the danger is only one factor to consider, and that because the analysis now required is fundamentally different, Honda is entitled to a new trial. In effect, Honda argues that *Prestage* announced a new common law rule, and that new rule should be applied retroactively so as to afford Honda a right to a new trial.

Both the Mississippi Supreme Court and this court have held that *Prestage* did not change the law. *Prestage* concluded that in prior decisions the Mississippi Supreme Court "has clearly moved away from a 'consumer expectations' analysis and has moved towards 'risk-utility.' " 617 So.2d at 253. It purported to apply a risk-utility analysis adopted in earlier decisions. *Id.* at 253. On rehearing the first appeal in our case, we explained that *Prestage* held that "contrary to prior Fifth Circuit opinions and this panel's opinion in the instant case, Mississippi applies a 'risk-utility' analysis in products liability cases and has done so since 1987." 993 F.2d at 57. We are not in a position to contradict the Mississippi Supreme Court's own conclusion, as well as that of our own panel, that *Prestage* did not change Mississippi law. It is true, however, that from the perspective of the parties in this case *Prestage* has changed the Fifth Circuit's reading of Mississippi law in that the patent danger of a product is not a

bar to recovery. That change is not in Honda's favor, nor does it mean that Honda was prejudiced by the law under which this case was tried.

The Mississippi court has explained to us in *Prestage* that the risk-utility analysis of the danger of a product is the analysis to be used, rather than that of only consumer expectations. Again, this modification of our understanding of Mississippi law does not help Honda in this case, and it will not justify affording Honda a new trial. The modification adds strings to the bow of the plaintiff, not the defendant. In the words of the *Prestage* court:

> [E]ven if a plaintiff appreciates the danger of a product, he can still recover for any injury resulting from that danger provided that the utility of the product is outweighed by the danger that the product creates.

617 So.2d at 254.

In the trial of this case the jury was instructed that Satcher's product liability claim depended upon his proving that "the product was in a defective condition making it unreasonably dangerous to the user." It was then explained to the jury:

> A product is in a defective condition unreasonably dangerous to the user when it has a propensity or a tendency for causing physical harm beyond that which would be contemplated by the ordinary user having ordinary knowledge of a product's characteristics known to the foreseeable class of persons who would normally use the product.

Acting under that instruction, the jury found for Satcher, necessarily finding that the ordinary user would not contemplate the full propensity or tendency of the lack of leg guards to cause physical harm. To be sure, users know that motorcycles are dangerous, and they know that the absence of leg guards might add to the chances of harm. This jury could find, however, that Honda's motorcycles were more likely to cost the rider a leg than the ordinary rider would contemplate. The evidence reflects experience with motorcycle injuries beyond the contemplation of the ordinary rider. Since the jury found for Satcher on this issue, it is immaterial whether the utility of the motorcycle without guards would weigh less than that danger. Satcher prevailed on the first step and need not be concerned with the second step, and a retrial to submit the second step cannot be justified.

B. *Punitive Damages*

The jury awarded and the district court entered judgment for punitive damages of $2 million. Honda asks that we reverse this award because applicable law and the evidence do not support it.

1. *Preservation of Error*

At the outset we address Satcher's argument that error was not properly preserved on this point. Satcher points out that Honda did not file a post-verdict motion for judgment under FED.R.CIV.P. 50(b). Rule 50(a) provides for the filing of a motion for judgment as a matter of law based on insufficient evidence prior to the submission of the case to the jury. Rule 50(b) provides for a renewed

motion (previously known as a motion for judgment notwithstanding the verdict or JNOV motion) after the verdict.

To fully preserve error on appeal for failure to grant a motion for judgment, the moving party must file both a pre-verdict Rule 50(a) motion at the close of all the evidence and the renewed Rule 50(b) motion. An appellant who failed to do so in the district court is not entitled to rendition of judgment in his favor on appeal, but is at most entitled to a new trial.[3]

Honda did, however, move for judgment as a matter of law on the issue of punitive damages at the close of the plaintiff's case and at the close of all the evidence. After the verdict Honda filed a motion styled a "motion for new trial," but it not only argued for a new trial but reurged the motion for judgment, and specifically argued that a directed verdict should have been granted on the claim for punitive damages.

Honda's noncompliance with the rule was little more than failing to style its motion correctly. We excuse technical noncompliance with Rule 50 where its basic purposes have been satisfied. *E.g., MacArthur v. University of Texas Health Center,* 45 F.3d 890, 896-98 (5th Cir.1995); *McCann v. Texas City Refining, Inc.,* 984 F.2d 667, 671 (5th Cir.1993) ("In the past, the Court has been willing to excuse certain 'de minimis' departures from technical compliance with Rule 50(b)."); *Bohrer v. Hanes Corp.,* 715

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[3] *Phillips v. Frey,* 20 F.3d 623, 627 (5th Cir.1994); *Zervas v. Faulkner,* 861 F.2d 823, 832 n. 9 (5th Cir.1988); *Smith v. Transworld Drilling Co.,* 773 F.2d 610, 615 (5th Cir.1985).

F.2d 213, 216-17 (5th Cir.1983), *cert. denied*, 465 U.S. 1026, 104 S.Ct. 1284, 79 L.Ed.2d 687 (1984). The basic purposes of the Rule are "to enable the trial court to re-examine the question of evidentiary insufficiency as a matter of law if the jury returns a verdict contrary to the movant, and to alert the opposing party to the insufficiency before the case is submitted to the jury, thereby affording it an opportunity to cure any defects in proof should the motion have merit." *Bohrer*, 715 F.2d at 216. We conclude that these basic purposes were satisfied here and that error was therefore preserved under Rule 50.

2. *Whether Satcher Is Entitled to Punitive Damages*

Judgment as a matter of law is proper on an issue if "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." FED.R.CIV.P. 50(a). In reviewing the denial of a motion for judgment, a jury verdict "must be upheld unless the facts and inferences point so strongly and so overwhelmingly in favor of one party that reasonable men could not arrive at any verdict to the contrary." *Western Co. of North America v. United States*, 699 F.2d 264, 276 (5th Cir.), *cert. denied*, 464 U.S. 892, 104 S.Ct. 237, 78 L.Ed.2d 228 (1983).

The law of Mississippi allows punitive damages only in "extreme cases;" they "are not favored in the law and are to be allowed only with caution and within narrow limits." *Tideway Oil Programs, Inc. v. Serio*, 431 So.2d 454, 460 & n. 1 (Miss.1983). "[T]here must be some element of aggression or some coloring of insult reflecting malice, gross negligence, or ruthless disregard for the rights

of others." *Illinois Cent. R.R. v. White*, 610 So.2d 308, 320 (Miss.1992). In regards to gross negligence, "punitive damages are ordinarily recoverable only in cases where the negligence is so gross as to indicate reckless or wanton disregard of the safety of others." *Beta Beta Chapter of Beta Theta Pi Fraternity v. May*, 611 So.2d 889, 894 (Miss.1992) (quoting *Belk v. Rosamond*, 57 So.2d 461, 468 (Miss.1952)).

Under these standards, we conclude that Satcher was not entitled to punitive damages. Evidence relevant to this inquiry – the dangers of a motorcycle lacking leg guards and Honda's knowledge of such dangers – can be summarized as follows. While police motorcycles have leg guards, all motorcycles marketed by all manufacturers to the general public lack them. Satcher's theory, therefore, was that Honda's conduct in marketing its products in the same design of every motorcycle marketed in the world to the general public was so extreme or outrageous as to justify punitive damages.

Motorcycle leg injuries are a common and serious problem of which Honda and the industry as a whole are aware. Leg injuries account for a significant percentage of all motorcycle injuries. The concept of protective leg guards on motorcycles has existed since the 1930's. A number of scientific studies, of which Honda is aware, have been conducted over the years regarding the efficacy of leg guards. A British physician, Dr. Bothwell, conducted some early tests in the 1960's. Two engineers, Arthur Ezra and Harry Peterson, received federal funding to conduct further tests at the Denver Research Institute (DRI). They both testified as experts for Satcher, and were of the view that "robust" leg guards or a reinforced

"fairing" should be available on motorcycles, and would have been effective in reducing Satcher's injuries. They believe that all motorcycles lacking leg guards are unreasonably dangerous products. An accident reconstruction expert, Dr. Fogerty, testified to the same effect. Ezra and Peterson worked with Dr. Bothwell on the DRI studies. Dr. Bothwell apparently disagrees with Ezra and Peterson, although the exact nature of the disagreement is not clear from the record.

"Conventional" leg guards or crash bars which are not as strong as Ezra and Peterson recommend are available in kits and are added to police motorcycles. Police crash bars are used in part to hold lights or other accessories needed on police vehicles. Their efficacy as a safety device is the subject of disagreement. Kenneth Harms, a former Miami police chief with experience on the motorcycle patrol and in investigating motorcycles accidents, believes that police crash guards, particularly those used on Harley-Davidson motorcycles, are effective in reducing injuries. Harms conceded that he had no scientific or engineering expertise in motorcycle design. Harley-Davidson has expressly recommended against the use of crash bars on its police motorcycles.

Although certain studies indicate that leg guards are effective, no government in the world has ever required them. No professional organization that reviews engineering safety standards, such as the Society of Automotive Engineers or the American National Standards Institute, has ever recommended leg guards. Ezra believes that the failure of the federal government to act on his own work was due to a deregulatory environment

in government during the Carter/Reagan years and pressure from the industry.

Honda presented two well-qualified experts, John Snider and Warner Riley, who opined that leg guards should not be used because their safety benefits are outweighed by their safety disadvantages, including the possibility of greater upper body injuries. For example, Riley explained that the problem with unpadded robust bars is that they can cause the cyclist to leave the motorcycle and land upside down, and that padded crash bars increase in-flight whiplash, which can result in a broken neck. They were also of the view that in this particular accident Satcher would not have benefitted from crash bars. There is a disagreement in the scientific community as to whether head impact increases when crash bars are used.

Honda itself conducted certain crash tests in the 1960's. One report concluded that at certain speeds crash bars are effective at reducing leg impact in an angled collision. However, it found that in broadside collisions "there seems to be an indication that each of the various body area impacts is greater in the case of motorcycles equipped with crash bars than in the case of those which are not," and that a commercially available crash bar "has no protective effect or it has a possible reverse effect in broadside collision[s]." This conclusion was disputed by Ezra as not supported by Honda's own experimental data. The report also noted that it was far from

definitive.[4] A Honda chief engineer testified that "thus far we have created, tested, evaluated various experimental devices; however, we have yet to come up with a . . . practical as well as effective device that would protect the leg."

Summarizing, the jury heard evidence that (1) there is a genuine dispute in the scientific community as to whether leg guards do more harm than good, (2) no government or agency thereof has ever required them, (3) no independent testing or professional organization has ever recommended them, (4) one of the original researchers on the problem who worked with two of plaintiff's experts disagrees with them, (5) the industry as a whole categorically rejects the need for leg guards, and (6) Honda's own testing on their use reached no definitive conclusions. On this record we hold that no reasonable jury could conclude under Mississippi law that this is an "extreme case" meriting punitive damages, or that Honda's conduct rose to level of "malice, ruthless disregard or gross negligence" required for the imposition of such damages. We therefore vacate the award of punitive damages.

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[4] It states in its preface:

> To judge the propriety of equipping motorcycles with crash bars, we must, as described later, have the cooperation of many other studies. The present test is by no means satisfactory; it is a mere fragment of the long-term test program extending over the future. Therefore, a definitive conclusion cannot be drawn from the present test results; however, our approach to the elucidation of effect of the crash bar is to be carried on for the improvement of motorcycle safety.

C. *Evidentiary Rulings*

Honda complains of several evidentiary rulings by the court. "Under [FED.R.EVID.] 103(a), appellate courts should reverse on the basis of erroneous evidentiary rulings only if a party's substantial rights are affected. Moreover, the party asserting error based on erroneous rulings bears the burden of proving that the error was harmful." *Carroll v. Morgan*, 17 F.3d 787, 790 (5th Cir.1994) (citation omitted).

Honda complains that Kenneth Harms (discussed above) should not have been allowed to testify as an expert on lower leg protection. "A trial court's ruling regarding admissibility of expert testimony is protected by an ambit of discretion and must be sustained unless manifestly erroneous." *Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106, 1109 (5th Cir.1991), *cert. denied*, 503 U.S. 912, 112 S.Ct. 1280, 117 L.Ed.2d 506 (1992). Honda argues that Harms is not an engineer; however FED.R.EVID. 702 allows that a witness may be qualified by "knowledge, skill, experience, training or education." The district court did not manifestly err in finding him qualified to testify as an expert. Among other qualifications, he was on the Miami police motor squad for approximately nine years, and has investigated hundreds of motorcycle accidents. Further, Honda does not demonstrate that its substantial rights were affected. Harms' testimony regarding leg guards was cumulative of the testimony of three other experts on this subject, and he was thoroughly cross-examined regarding his lack of formal scientific and engineering training.

Honda next complains that the testimony of Ezra and Peterson regarding the severity of Satcher's injuries if a crash bar had been installed was speculative or lacking in scientific certainty. We fail to see any error here. Both experts were highly qualified. Both testified that with proper leg protection Satcher would not have lost his leg, and Ezra testified that he might have suffered no more than a bruise. The testimony was properly allowed.

Honda also complains that the court erred in not allowing its experts to change or modify at trial their opinions given in pretrial discovery that the accident occurred in Satcher's lane. The experts agreed before trial that the collision occurred in Satcher's lane, in part because an eyewitness and the police officer who investigated the accident had given statements supporting this conclusion. These two individuals then gave different testimony at trial, suggesting that the collision might have occurred in the automobile's lane. The district court reasoned that it would be unfair to allow the experts to change their testimony after discovery. Honda argues that this issue is relevant to Satcher's contributory negligence and assumption of the risk. While the lane in which the accident occurred is certainly relevant to contributory negligence, Honda fails to show that its substantial rights were affected. The jury heard from Satcher, the eyewitness and the police officer at trial. The jury hardly needed expert testimony to explain that driving in the wrong lane of traffic is negligent. As to the question of which lane the accident occurred, Honda fails to explain how expert testimony would have significantly bolstered or discredited the testimony of the lay witnesses.

Finally, Honda complains that the district court erred in failing to submit a jury issue on assumption of risk. The court did submit instructions on contributory negligence. In *Braswell v. Economy Supply Co.*, 281 So.2d 669, 677 (Miss.1973), the Mississippi Supreme Court held that where contributory negligence and assumption of risk overlap and coincide, the defense of contributory negligence applied. "If the circumstances show that the plaintiff may have assumed the risk but also indicate that the plaintiff may have been negligent without assuming the risk, then the two doctrines overlap, and only the comparative negligence instruction should be given." *Richardson v. Clayton & Lambert Mfg. Co.*, 657 F.Supp. 751, 754 (N.D.Miss.1987). The court did not err in refusing to submit the assumption of risk instruction.

The award of punitive damages is vacated and in all other respects the judgment is affirmed.

AFFIRMED IN PART, VACATED IN PART.

RHESA HAWKINS BARKSDALE, Circuit Judge, dissenting in part and concurring in part:

"Spur not an unbroken horse; put not your plowshare too deep into new land." Sir Walter Scott, *The Monastery [1820]. Answer of the Author of Waverley to the Letter of Captain Clutterbuck*, ch. 25. Even though this matter is governed by entirely new ground rules, the majority refuses to remand it for a new trial. Accordingly, I respectfully dissent from that part of its opinion (part A; *"The Impact of Prestage"*); in all other respects, I concur.

The Mississippi Supreme Court's fairly recent holding in *Sperry-New Holland v. Prestage*, 617 So.2d 248,

253-56 (Miss.1993), that "risk-utility", rather than "consumer expectations", is, and has been since 1988, the relevant analysis for Mississippi strict product liability was, to say the least, most unexpected.[1] *See, e.g., Batts v. Tow-Motor Forklift Company*, 153 F.R.D. 103, 106 (N.D.Miss.1994) (observing that with *Prestage*, "the Mississippi Supreme Court let the rest of the world in on the best kept secret in Mississippi jurisprudence"). But, *Prestage* provided only a broad statement of the law of Mississippi; and, for the reasons set forth below, I cannot join in the majority's application of this analysis, still in its infancy in Mississippi, to justify not holding a new trial.

The majority has concluded that a new trial is not justified, apparently because Honda would have no reasonable chance of success under the risk-utility analysis. I cannot agree. To date, there are no published cases in Mississippi either applying, or further defining, the *Prestage* analysis.[2] This alone gives pause to the majority's

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[1] The author of the majority opinion is one of the few who previously questioned Mississippi's adherence to the consumer expectations test. *See Melton v. Deere & Co.*, 887 F.2d 1241, 1246-47 (5th Cir.1989) (Reavley, J., dissenting).

[2] Not only are there no cases expounding *Prestage*, there are also no Mississippi cases detailing the analysis of the cases on which *Prestage* relied: *Whittley v. City of Meridian*, 530 So.2d 1341 (Miss.1988), and *Hall v. Mississippi Chemical Exp., Inc.*, 528 So.2d 796 (Miss.1988). Indeed, one court has observed that between 1988, when Mississippi is said to have adopted the risk-utility analysis, and 1993, when *Prestage* was decided, at least one Mississippi Supreme Court case implied that the consumer expectations test was still applicable. *See Batts*, 153 F.R.D. at 108-09 (citing *Kussman v. V & G Welding Supply, Inc.*, 585 So.2d 700, 703-04 (Miss.1991)).

conclusion that Honda would necessarily lose under risk-utility. Furthermore, to the extent *Prestage* can be clearly understood, I am troubled by the majority's application.

As stated in *Prestage*, the proper inquiry in Mississippi for a strict product liability claim is whether "the danger-in-fact . . . outweighs the utility of the product". 617 So.2d at 254. But, the Mississippi Supreme Court provided little, if any, guidance for making this inquiry, stating only that, "[i]n balancing a product's utility against the risk of injury it creates, a trial court *may find it helpful* to refer to the seven factors enumerated in Professor John Wade's article, *On the Nature of Strict Tort Liability for Products*, 44 Miss.L.J. 825." *Id.* at 256 n. 3 (emphasis added). Those factors are:

> (1) The usefulness and desirability of the product – its utility to the user and to the public as a whole.
>
> (2) The safety aspects of the product – the likelihood that it will cause injury, and the probable seriousness of the injury.
>
> (3) The availability of a substitute product which would meet the same need and not be as unsafe.
>
> (4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.
>
> (5) The user's ability to avoid danger by the exercise of care in the use of the product.
>
> (6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of

> the obvious condition of the product, or of the existence of suitable warnings or instructions.
>
> (7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

Id. The majority seems to have found one of the above factors, number six, to be dispositive, stating:

> Acting under [a consumer expectations] instruction, the jury found for Satcher, necessarily finding that the ordinary user would not contemplate the full propensity or tendency of the lack of leg guards to cause physical harm. . . . Since the jury found for Satcher on this issue [consumer expectations], it is immaterial whether the utility of the motorcycle without guards would weigh less than that danger. Satcher prevailed on the first step and need not be concerned with the second step, and a retrial to submit the second step cannot be justified.

By the foregoing, I understand the majority to conclude that the jury's finding on consumer expectations trumps, even under the risk-utility analysis.[3] This runs contrary to even the minimal guidance offered by *Prestage*.

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[3] It seems more than somewhat anomalous to give credence to the jury's verdict for Satcher under the consumer expectations test, when, on appeal from that verdict, our court found that, under this (consumer expectations) analysis, Honda was entitled to judgment as a matter of law; accordingly, we reversed and rendered judgment for Honda. *Satcher v. Honda Motor Co., Ltd.*, 984 F.2d 135, 138 (5th Cir.), *vacated*, 993 F.2d 56 (5th Cir.1993). Our court vacated its opinion, not because of a change of heart regarding Honda's entitlement to judgment under the consumer expectations analysis, but because *Prestage*

In light of the seven factors *suggested* by *Prestage*, a consumer's awareness of the danger inherent in a product is but one factor to consider in the risk-utility analysis. *See also Prestage*, 617 So.2d at 256 n. 4 (rejection of "patent danger" rule). Moreover, *Prestage* held that foreseeability of danger was not dispositive: "In determining whether a product is unreasonably dangerous a reasonable person must conclude that the danger-in-fact, *whether foreseeable or not*, outweighs the utility of the product." *Id.* at 255. (emphasis added) (quoting *Whittley v. City of Meridian*, 530 So.2d 1341, 1347 (Miss.1988)).[4]

Rightfully so, the majority does not undertake to predict the outcome in this case when all of the suggested factors for risk-utility analysis are applied. With almost no guidance on risk-utility from the Mississippi courts, we cannot forecast how a jury might weigh the factors

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revealed that consumer expectations was no longer the test in Mississippi. *Satcher*, 993 F.2d at 57-58.

[4] *Prestage* reads:

> In a "risk-utility" analysis, a product is "unreasonably dangerous" if a reasonable person would conclude that the danger-in-fact, *whether foreseeable or not*, outweighs the utility of the product. Thus, even if a plaintiff appreciates the danger of a product, he can still recover for any injury resulting from that danger provided that the utility of the product is outweighed by the danger that the product creates.

Id. at 254 (emphasis added). The *Prestage* court made this statement as a comparison between risk-utility and consumer expectations – noting that, with risk-utility, unlike consumer expectations, the plaintiff does not automatically lose only because he "appreciates the danger of a product". Of course, the court did not mean that the opposite was true. *See Id.* at 254, 255 n. 3 & 4.

and evidence here. The majority notes correctly that the risk-utility analysis "adds strings to the bow of the plaintiff, not the defendant" but, as noted, a panel of this court held that, as a matter of law, Honda *prevailed* under the consumer expectations analysis, and that holding was vacated only because *Prestage* signaled that consumer expectations was no longer the test in Mississippi. *See* note 3, *supra*. To hold now that Honda necessarily *loses* is a leap I cannot take.

The risk-utility analysis hardly leaves Honda with no "strings in its bow". For instance, perhaps it could make a case for the high utility of motorcycles in general. For another example, and as to the design at issue, Honda offered evidence that the addition of leg guards, although offering greater protection against the injury suffered by Satcher, might actually increase the likelihood of fatal injury – an obvious important factor in a risk-utility analysis. Does this mean Honda will prevail? I would not – and, indeed, cannot – hazard a guess. I note only the obvious: the ground rules have changed dramatically in Mississippi, and those rules have yet to be defined with any precision. As such, I cannot agree with the majority that it would be unjustified to permit the parties to present their cases to the jury under the proper legal standard. To the contrary, in my opinion, justice requires it.

Accordingly, I must regretfully, but most respectfully, dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

JAMES C. SATCHER — **PLAINTIFF**

VERSUS — **1:87-CV-635PR**

HONDA MOTOR CO., LTD, AMERICAN HONDA MOTOR COMPANY [sic] CO., INC. and HONDA RESEARCH AND DEVELOPMENT COMPANY, LTD — **DEFENDANTS**

MEMORANDUM OPINION AND ORDER ON REMAND

(Filed Jun. 23, 1994)

This matter is before this Court on remand from the Fifth Circuit.

PROCEDURAL HISTORY

This product liability case involving a motorcycle-car collision that occurred on October 15, 1985, was filed on October 8, 1987. On October 5, 1990, the defendants moved for summary judgment. This case was assigned to this Court on October 18, 1990, and the motion for summary judgment was denied by this Court[1] on February 5,

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[1] 758 F. Supp. 393 (S.D. Miss. 1991). In denying Defendants' Motion for Summary Judgment this Court concluded that there were genuine issues of material fact that should be submitted to a jury for resolution, including the defense of "open and obvious." Prior to this Court's opinion, there were at least two Fifth Circuit opinions that had held that the defense of "open and obvious" was properly submitted to the jury. *See, Garner v. Santoro,* 865 F.2d 629 (5th Cir. 1989) (remanded on other grounds) (failure to warn); and *Page v. Barko Hydraulics,* 673 F.2d

1991. On February 27, 1991, following a jury verdict, judgment was entered for plaintiff both as to compensatory and punitive damages. A timely motion for new trial was filed by defendants. Defendants filed neither a motion for directed verdict on the defense of open and obvious nor a motion for judgment notwithstanding the verdict on any ground. On September 23, 1991, this Court rendered a decision denying defendants' motion for a new trial. Timely appeal was made to the Fifth Circuit. On January 25, 1993, a panel of the Fifth Circuit entered an opinion reversing and rendering judgment for defendants.[2] Plaintiff filed a petition for rehearing. On May 28, 1993, the Fifth Circuit granted the rehearing and vacated

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134 (5th Cir. 1982) (remanded on other grounds) (defective design). Additionally, another Fifth Circuit case handed down since the trial of this matter held the defense of "open and obvious" was properly submitted to the jury. *See, Batts v. Tow-Motor Forklift Co.*, 978 F.2d 1386 (5th Cir. 1992). There were also Fifth Circuit decisions holding that the defense of "open and obvious" was a legal question and summary judgment or directed verdict in favor of the defendant was appropriately entered by the trial court. In its opinion denying summary judgment, and in holding that the defense of "open and obvious" should be submitted to the jury, this Court erroneously discussed the "open and obvious" defense from a "subjective" standpoint rather than an "objective" standpoint. However, when this case was submitted to the jury the open and obvious defense was defined under an "objective" not a "subjective" standard.

[2] 984 F.2d 135 (5th Cir. 1993). The Fifth Circuit in its original Opinion noted that this Court had erroneously applied a "subjective standard" to the defense of "open and obvious" and held that the question of "open and obvious" should have been ruled on as a matter of law and that Defendants' Motion for Summary Judgment should have been sustained.

its January 25, 1993, opinion and remanded the case to this Court.

After remand, defendants filed a pleading styled Second Supplemental Motion for New Trial and Motion for Judgment Notwithstanding the Verdict.[3] Plaintiff has moved to strike the Motion for Judgment Notwithstanding the Verdict as untimely.[4] Plaintiff has filed a pleading styled "Motion to Reaffirm Judgment After Reconsideration on Remand."

Defendants assert that they are entitled to judgment as a matter of law based on state law precedent that was in effect at the time this case was tried in 1991, and that *Prestage*[5] established a new standard of liability and care and that to apply it retroactively would result in manifest injustice to the defendants. Defendants further contend that if the Court applies *Prestage* then they are entitled to a new trial because of the application of the "consumer expectations test" rather than the "risk-utility analysis" and further that the punitive damages section of House

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[3] This is now a motion for judgment as a matter of law under Amended Rule 50, Federal Rules of Civil Procedure.

[4] Defendants did not at any time make a Motion for Directed Verdict as to the defense of "open and obvious," as indicated above, and did not make a Motion for Judgment Notwithstanding the Verdict on any ground at any time before this matter was remanded to this Court.

[5] *Sperry-New Holland v. Prestage*, 617 So. 2d 248 (Miss. 1993), decided by the Mississippi Supreme Court on March 25, 1993, precipitated the Fifth Circuit's remand of the instant action.

Bill 1270[6] (§ 11-1-65 of Miss. Code of 1972), effective July 1, 1993, affects the procedure for determining punitive damages and thus affects plaintiff's entitlement to punitive damages in this action.

Plaintiff responds that §§ 11-1-63, 11-1-65, as enacted in House Bill 1270, have no application to this case and that *Prestage* merely clarified existing law in Mississippi and is in harmony with this Court's earlier ruling that the "open and obvious" defense is a question for the jury and not a complete bar to his recovery.

In the opinion of the Fifth Circuit granting the petition for rehearing and remanding this case, the Court stated:

> In view of recent developments in the law governing products liability in Mississippi, we now VACATE our original opinion and REMAND the case to the district court for further consideration in the light of these developments.
>
> On March 5, 1993, the Mississippi state legislature enacted House Bill 1270, codifying various elements of Mississippi common law regarding products liability. On March 25, 1993, the Mississippi Supreme Court issued its opinion in *Sperry-New Holland v. Prestage*, 617 So. 2d 248, holding that, contrary to prior Fifth Circuit

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[6] This is now codified at Miss. Code Ann. § 11-1-63 (products liability section) and § 11-1-65 (punitive damages section). The bill was adopted by the Mississippi House of Representatives on February 8, 1993, the Mississippi Senate on February 17, 1993, and approved by the Governor of Mississippi on February 18, 1993.

> opinions and this panel's opinion in the instant case, Mississippi applies a "risk-utility" analysis in products liability cases and has done so since 1987.[7] These events, occurring subsequent to the panel opinion in this case but while petitions for rehearing were pending before the court, have the potential to alter drastically Mississippi's products liability law.
>
> The appellants argue in response to the petition for rehearing that *Sperry-New Holland* should not be applied to this case because doing so would result in manifest injustice to the parties, that the risk-utility standard does not preclude summary judgment in this case, and that House Bill 1270 codifies Mississippi law as it existed pre *Sperry-New Holland* and changes procedures relative to punitive damage awards. The district court, with its extensive knowledge of the facts and proceedings in this case, is in a far better position than are we to address and to first apply these new arguments, and to apply the newly developed law to the facts of this case. Thus, we vacate our original opinion and remand this case to the district court for further consideration.

As this Court understands the remand, and the motions filed by the parties since remand, this Court is to decide the following questions:

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[7] The Mississippi Supreme Court relied on *Whittley v. City of Meridian*, 530 So. 2d 1341 (Miss. 1988), and *Hall v. Miss. Chemical Exp., Inc.*, 528 So. 2d 796 (Miss. 1988), to support the holding of *Prestage*. In *Prestage*, *Hall* is cited as a 1987 decision, 617 So. 2d at 253. However, both decisions were handed down in 1988.

(1) Does House Bill 1270 merely codify Mississippi law as it existed prior to *Prestage*?

(2) What is the effect of House Bill 1270 on this case?

(3) What is the effect of *Sperry-New Holland v. Prestage*, 617 So. 2d 248, on this case?

(4) If *Prestage* is applicable: (a) will its application result in manifest injustice to defendants; and (b) does the risk-utility standard preclude summary judgment in this case?

(5) Should defendants' Motion for Judgment Notwithstanding the Verdict be stricken as untimely filed?

(6) Are defendants entitled to a new trial?

1. DOES HOUSE BILL 1270 MERELY CODIFY MISSISSIPPI LAW AS IT EXISTED PRIOR TO *PRESTAGE*?

House Bill 1270 provides that a plaintiff cannot recover in a products liability suit for (1) a construction or manufacturing defect, (2) inadequate warnings, (3) a design defect, or (4) breach of expressed warranty if the plaintiff has deliberately and voluntarily chosen to expose himself to a danger *known and appreciated*. Thus the Bill spells out that what has previously been regarded as an "assumption of the risk" defense will be a bar in those four specified types of products liability cases. This defense will be predicated upon the subjective knowledge of a plaintiff. The Bill also provides that as to product liability cases involving inadequate warnings the

defense of "open and obvious" will be a bar.[8] The standard for determining whether the product is unreasonably dangerous will be an "objective" one, not a "subjective" one. Thus, in *inadequate warning cases* "assumption of the risk" and "open and obvious" have been codified as bars to recovery under this Bill after July 1, 1994. In other products liability cases, "assumption of the risk," but not "open and obvious" will be a bar.

This Bill changes the burden of proof as well as the procedure for consideration of punitive damages. After July 1, 1994, punitive damages can be awarded only upon proof of "clear and convincing evidence." In cases filed after July 1, 1993, and in cases pending on July 1, 1993, in which judgment had not been entered, the procedure for awarding punitive damages is changed to the extent that a bifurcated trial is required. *See,* MISS. CODE ANN. §11-1-65 (Supp. 1993).

The legislature adopted House Bill 1270 a little over a month before *Prestage* was decided. Since the *Prestage* decision had not been decided when the legislature adopted House Bill 1270, that decision could not have influenced the passage of House Bill 1270. Judicial decisions generally operate retrospectively since they are regarded as expressions of pre-existing law while statutory enactments operate only prospectively absent a clear

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[8] The Bill codifies the "consumer expectations test" as espoused in Comment i, Restatement of Torts (Second) in products liability cases involving inadequate warnings, but does not codify the "consumer expectations test" in other products liability cases. *See* § 11-1-63(e).

intent by the drafters requiring their retroactive application. *See, Kaiser Aluminum v. Bonjorno*, 494 U.S. 827, 110 S. Ct. 1570, 108 L. Ed. 2d 842 (1990); and *U. S. v. Security Industrial Bank*, 459 U. S. 70, 103 S. Ct. 407, 74 L. Ed. 2d 235 (1982). Thus, under general legal principles, *Prestage* would operate retrospectively and House Bill 1270 would operate prospectively.

If House Bill 1270 was merely a codification of existing law immediately pre-*Prestage* (Again, the Bill was adopted a little over a month before *Prestage* was decided.), the legislature would have had no reason to delay the effect of the substantive portions of the bill relating to products liability until July 1, 1994, more than a year after its adoption. House Bill 1270 does not merely codify Mississippi products law as it existed prior to *Prestage*. It substantially changed that law. Under *Prestage*, "risk utility" would be the appropriate analysis and "assumption of the risk" would not be a complete bar. 671 So. 2d 256, 254. Under House Bill 1270 the "assumption of the risk" defense appears to replace the "risk utility analysis" of *Prestage* except in inadequate warnings cases where both "assumption of the risk" and "open and obvious" will apparently replace "risk utility." One cannot say with certainty what the law on this question was in Mississippi prior to 1988. However, the Mississippi Supreme Court in *Prestage* has determined what the law was from 1988 to July 1, 1994. "Risk utility" was the correct analysis during that period.

Whether House Bill 1270 changed the law, or merely codified pre-*Prestage* law is immaterial for two reasons. First, *Prestage* determines what the law on products liability was in Mississippi prior to the adoption of House

Bill 1270. *Prestage* determines Mississippi law on products liability from at least 1988 to July 1, 1994, and House Bill 1270 determines Mississippi law on products liability after July 1, 1994. This case was tried in 1991. Thus, this case is controlled by *Prestage*. Secondly, House Bill 1270 would not help defendants even if applicable, which it is not. The "open and obvious" defense of House Bill 1270 applies only to "inadequate warnings cases." This case was tried under a design defect theory. Therefore, even under House Bill 1270 the "open and obvious" defense would not be a bar to design defect.

For the reasons stated above it is immaterial whether House Bill 1270 codified Mississippi Products Liability law pre-*Prestage*.

2. DOES HOUSE BILL 1270 HAVE ANY EFFECT ON THIS CASE?

The enacting paragraph of House Bill 1270 provides:

> SECTION 5. This act shall take effect and be in force from and after July 1, 1993. Procedural provisions of this act, including subsections (1)(a), (b), (c) and (d) of Section 2 [§ 11-1-65] shall apply to all pending actions in which judgment has not been entered on the effective date of the act, and all actions filed on or after the effective date of the act. All other provisions shall apply to all actions filed on or after July 1, 1994.

The entire products liability section, § 11-1-63, and the substantive portions of the punitive damages section, § 11-1-65, do not go into effect until July 1, 1994. The procedural provisions of § 11-1-65, subsections (1)(a), (b),

(c) and (d), apply only to "pending actions in which judgment has not been entered on the effective date of the act, and all actions filed on or after the effective date of the act," which was July 1, 1993.

Final Judgment on the jury verdict was entered in this matter on February 27, 1991, and defendants' Motion for New Trial was denied September 23, 1991. Therefore, since the procedural provisions of § 11-1-65, subsections (1)(a), (b), (c) and (d), apply only to "pending actions in which judgment has not been entered on the effective date of the act," this case was not a "pending" action in which judgment had not been entered for purposes of application of the procedural portions of Section 2 of House Bill 1270.[9] The remaining portions of the bill are not effective until July 1, 1994, and have no effect on this action. Defendants' arguments to the contrary are without merit, House Bill 1270 has no application to this case.[10]

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[9] Miss. Code Ann. § 11-1-65, §§ (1)(a), (b), (c) & (d) (Supp. 1993).

[10] There is no situation in which the substantive aspects of House Bill 1270 could impact on this case either in regard to punitive damages or products liability law. However, if for any reason the judgment should be set aside, and a new trial granted, in the opinion of this Court, the procedural aspects of House Bill 1270 as to punitive damages (that is the bifurcated trial) would then be applicable.

3. IS *PRESTAGE* APPLICABLE TO THE FACTS IN THIS CASE?

"Federal courts . . . in this Circuit are obliged to apply the latest and most authoritative expression of state law applicable to the facts of a case." *LeMarque v. Massachusetts Indm. & Life Ins. Co.*, 794 F.2d 194, 196 (5th Cir. 1986) "If substantive state law changes between the time of a federal trial and appeal, federal appellate courts must apply the state law as of the time of the appeal to give effect to the intervening state court decision." *Sioux Ltd. Sec. Litigation v. Coopers and Lybrand*, 914 F.2d 61, 63 (5th Cir. 1990). Consequently, under the *Erie* doctrine[11], the holding of the Mississippi Supreme Court in *Prestage* is binding upon federal courts. Since this case involves the same issue addressed in *Prestage*, *Prestage* is applicable to this case.

4A. DOES THE APPLICATION OF *PRESTAGE* RESULT IN MANIFEST INJUSTICE TO DEFENDANTS?

Defendants argue that *Prestage* established new law and that to apply such new law retrospectively would result in manifest injustice to Defendant. The fallacy of defendants' argument is that *Prestage* did not establish new law. The Fifth Circuit in its opinion remanding this case to this Court stated that *Prestage* held that "contrary to prior Fifth Circuit opinions and this panel's opinion in

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[11] *Erie Railroad Company v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

the instant case, Mississippi applies a 'risk-utility analysis' in products liability cases, and has done so since 1987."[12] *Satcher v. Honda Motor Co., Ltd.*, 993 F.2d 56, 57.

In *Prestage*, the Mississippi Supreme Court held "we today *apply* a 'risk-utility' analysis as *adopted* in *Whittley v. City of Meridian*, 530 So. 2d 1341 (Miss. 1988), and *Hall v. Miss. Chemical Exp., Inc.*, 528 So. 2d 796 (Miss. 1987)." *Sperry-New Holland v. Prestage*, 617 So. 2d at 253 (emphasis added). Thus, based upon the explicit words found in the *Prestage* opinion itself, and the Fifth Circuit analysis of that opinion in remanding this case, *Prestage* did not announce new law, but articulated and explained law that had been in effect in Mississippi since 1988.[13] Defendants' argument that *Prestage* established new law is contrary to the facts.

The argument that *Prestage* announces new law and that to apply it to the facts of this case would create a miscarriage of justice for defendants is totally misplaced and has no application to the facts of this case. *See LeMarque, supra*, and *Coopers and Lybrand, supra*.

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[12] See footnote 7.

[13] The clarification by the Mississippi Supreme Court that the "risk-utility analysis" had replaced the "consumer expectations test" with these two decisions has been referred to as "the best kept secret in Mississippi jurisprudence." *Batts v. Tow-Motor Forklift Company*, 1994 WL 58285 (N.D. Miss., Feb. 8, 1994). Judge Davidson, in granting Rule 60(b)(6) relief to the Plaintiff in *Batts* after the decision in *Prestage*, discussed candidly the incongruity of relying on *Hall* and *Whittley* for the holding of *Prestage*, while recognizing that certainly *Prestage* is the law in Mississippi regardless of its parentage and is thus binding on federal courts applying Mississippi law.

4B. DOES A RISK-UTILITY ANALYSIS PRECLUDE SUMMARY JUDGMENT IN THIS CASE?

Prior to trial, and during and after trial, defendants' major argument was that summary judgment should be granted because the doctrine of crash worthiness should not be extended to motorcycles. While on appeal, defendants changed the emphasis of their argument and contended that summary judgment should have been granted because the dangerous condition was "open and obvious." In *Prestage* the Mississippi Supreme Court held that the defense of "open and obvious" was not a bar in products liability cases and thus a motion for summary judgment should not have been granted on the basis of the defense of "open and obvious."

In *Prestage*, "The trial court denied Sperry's Motion for Summary Judgment; denied its Motion for Directed Verdict; denied its request for preemptory instructions; and denied its Motion for Judgment Notwithstanding the Verdict [J.N.O.V.]." 617 So. 2d at 251. The Mississippi Supreme Court affirmed, holding "Sperry's Motion for Summary Judgment, directed verdict, JNOV, and its request for preemptory instruction were all properly denied." 617 So. 2d at 256.

Under the "risk-utility analysis", open and obvious is not a complete bar to potential recovery, it is simply a factor to consider in determining whether a product is unreasonably dangerous.[14] *Sperry-New Holland v. Prestage*,

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[14] The view expressed in *Prestage* that open and obvious is not a complete bar is in unison with this Court's previous opinion wherein the Court expressed the belief that the open and

617 So.2d at 256, n.4. As the majority in *Prestage* stated, "Thus, even if a plaintiff appreciates the danger of a product, he can still recover for any injury resulting from that danger provided that the utility of the product is outweighed by the danger that the product creates. Under the 'risk-utility' test, either the judge or the jury can balance the utility and the danger-in-fact, or risk, of the product." 671 So.2d at 254. (citations omitted).

The original Fifth Circuit panel decision in this case determined that summary judgment should have been granted on the basis of the "open and obvious" defense based on an "objective" not a "subjective" finding. That decision was vacated because of *Prestage* and House Bill 1270. *Prestage* recognized that the defense of "open and obvious" was not a total bar in products liability cases. Under *Prestage* this case should have gone to the jury. Accordingly, under *Prestage*, summary judgment is not appropriate.

5. SHOULD DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BE STRICKEN AS UNTIMELY FILED?

Defendants filed no motion for a directed verdict and no motion for a preemptory instruction based on the defense of "open and obvious." Additionally, defendants filed no motion for judgment notwithstanding the verdict on any ground, until after remand. However, after the

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obvious bar was diametrically opposed to Mississippi's adoption of the "pure" form of comparative negligence. *See* Miss. Code Ann. §11-7-15 (1972).

jury verdict, defendants did file a Motion for a New Trial. In the body of defendants' original Motion for a New Trial was the following paragraph:

> "4. The defects attributed to the motorcycle were conditions which were open and obvious to a casual observer, or to any ordinary consumer, and therefore, Defendants were, as a matter of law, entitled to a verdict in their favor on each of Plaintiff's causes of action."

The introductory paragraph of defendants' original Motion for a New Trial provided only that "Defendants . . . move for a new trial. . . . " The Motion contained no prayer for relief and requested no relief other than the request for a new trial as set out in the introductory paragraph. Defendants did raise the defense of "open and obvious" as a ground for a new trial; however, the record is clear that the defendants did not request a judgment notwithstanding the verdict in their Motion for New Trial, or at any other time, until after remand of this case.

This Court in ruling on defendants' Motion for New Trial recognized that defendants were advancing the same argument as they had advanced for summary judgment, in regard to "open and obvious." However, this Court did not understand or interpret that to be a request for a judgment notwithstanding the verdict and defendants never so stated that to the Court nor was it addressed by the Court.

The "open and obvious" defense was discussed very little at the hearing on the motion for a new trial. Indeed, even in regard to defendants' motion for summary judgment, the thrust of defendants' argument was not the

defense of "open and obvious" but the question of whether the crash worthiness doctrine should be extended to motorcycles as well as automobiles. The "open and obvious" defense was only an incidental issue to defendants until the decision in *Toney v. Kawasaki Heavy Industries, Ltd.*, 763 F. Supp. 1356 (S.D. Miss. 1991).

In *Wells v. Hico Indep. School Dist.*, 736 F.2d 243 (5th Cir. 1984), *cert. denied*, 473 U.S. 901 (1985), the Fifth Circuit held:

> Appellants also argue *inter alia* that the district court erred in failing to grant their motion for summary judgment on both due process issues and asks us to reverse the decision below on this basis. We decline to do so. . . . Once trial began, the summary judgment motions effectively became moot. . . . As this Court has held:
>
> > The saving of time and expense is the purpose to be attained by a motion for summary judgment in the proper case. When in due course the final trial is had on the merits it becomes the best test of the rights of the movant. If he wins on trial he has his judgment. If he loses on a fair trial it shows that he ought not to have any judgment. *Woods v. Robb*, 171 F.2d 539, 541 (5th Cir. 1948).
>
> We find no reason here to depart from this common sense approach.

736 F.2d at 251, fn.9.

"[W]e normally do not review the denial of a motion for summary judgment which is followed by a full trial on the merits, the judgment being based on the latter."

Zimzores v. Veterans Administration, 778 F.2d 264, 267 (5th Cir. 1985)

> . . . denial of summary judgment will not serve as a ground of appeal after the movant loses a full trial on the merits. This is so because it would be unjust for the court of appeal to deprive a party of a judgment rendered after a full trial based upon the appellate court's examination of the evidence presented at the time of the motion.

6 Moore's Federal Practice § 56.22 at 64 (Supp. 1992-93).

> It would be a constitutionally impermissible re-examination of the jury's verdict for the district court (or this court) to enter judgment N.O.V. on a ground not raised *in the motion for directed verdict.*

McCann v. Texas City Refining Co., Inc., 984 F.2d 667, 672 (5th Cir. 1983). (Emphasis added.) (Other citations omitted) Since it is "constitutionally impermissible" for this Court to grant a "Judgment N.O.V. on a ground not raised in a motion for directed verdict" and since defendants filed no motion for a directed verdict on the "open and obvious" defense, this Court is prohibited from granting a judgment notwithstanding the verdict.

Defendants style the motion it filed before this Court after remand as Second Supplemental Motion for New Trial and Motion for Judgment Notwithstanding the Verdict. Although defendants had filed two motions asking for a new trial, defendants filed no motion requesting judgment notwithstanding the verdict. In the Motion for a New Trial the defense of "open and obvious" was mentioned only as outlined above. One cannot file a

second or supplemental motion as to a motion that was never filed.

Based on the foregoing, this Court finds that plaintiff's motion to strike defendants' pleading styled Second Supplemental Motion for Judgment Notwithstanding the Verdict is meritorious and should be granted. However, regardless of the procedural problems, defendants are not entitled to a judgment notwithstanding the verdict under the holding of *Prestage* as more fully discussed under other headings.

6. ARE DEFENDANTS ENTITLED TO A NEW TRIAL?

Defendants contend, in the alternative, that they are entitled to a new trial. Motions for a new trial are ordinarily vested in the sound discretion of the Court. The Fifth Circuit test for granting motions for a new trial is whether the verdict is against the "great weight" of the evidence. *See Shows v. Jamisson Bedding, Inc.*, 671 F.2d 927 (5th Cir. 1982) A trial court should grant a motion for a new trial if convinced that failure to do so would result in a miscarriage of justice. 11 C. Wright & A. Miller, Federal Practice and Procedure: Civil §2806 at 49 (1973) The Fifth Circuit exercises a "broader review" of orders *granting* motions for a new trial on the basis of the verdict being against the great weight of the evidence than orders *denying* motions for a new trial, and in cases where a new trial has been granted exercises "particularly close scrutiny, to protect the litigant's right to a jury trial." *Shows*, 671 F.2d at 930. (citation omitted.)

However, defendants do not argue in this case that the verdict was against the great weight of the evidence.

Defendants argue that they should be granted a new trial because the case was submitted to the jury under a "consumer expectations" analysis rather than a "risk utility" analysis. The problem with defendants' position is that they requested no instructions to present the case to the jury under the "risk-utility" analysis. The instructions on the "consumer expectations" test were submitted and argued for by the defendants and given by the Court.

Even though neither side cites specific authority, this Court concludes that it should analyze the motion for a new trial on the basis of whether failure to grant the motion would result in "manifest injustice" to defendants. This test has been used to determine if a motion for a new trial should be granted on the basis that the verdict is against the great weight of the evidence, and it is used by appellate courts when determining whether or not to consider grounds raised for the first time on direct appeal. *See Singleton v. Wulff*, 428 U.S. 106, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976); and *Response of Carolina, Inc. v. Leasco Response, Inc.*, 537 F.2d 1307 (5th Cir. 1976).

The appropriate place to begin that analysis is a consideration of the difference between an analysis under the "consumer expectations" test and an analysis under the "risk-utility" test as enunciated by the Mississippi Supreme Court. That analysis should start with the court's holding in *Prestage*.

The Court in that case reasoned:

> The doctrine of strict liability for a manufacturer, without negligence, was first applied in Mississippi in *State Stove Manufacturing Co. v. Hodges*, 189 So. 2d 113, 119 (Miss. 1966). *State*

Stove has been consistently followed in Mississippi for many years.

In *State Stove*, this Court accepted strict liability and defined its purpose as follows:

> The purpose of [strict] liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.

Id. at 120 (citation omitted) *State Stove* adopted that version of strict liability stated in Section 402A of the American Law Institute's Restatement of Torts (Second). It states:

> § 402 A. Special Liability of Seller of Product for Physical Harm to User or Consumer.
>
> (1) One who sells any product in a *defective condition unreasonably dangerous* to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and

> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.
>
> Restatement (Second) of Torts § 402A. (Emphasis added). . . .

617 So. 2d at 253.

> Section 402A is still the law in Mississippi. How this Court defines the phrases "defective condition" and "unreasonably dangerous" used in 402A dictates whether a "consumer expectations" analysis or a "risk-utility" analysis will prevail.

Id. at 254.

The Court then discussed the "consumer expectations" test and concluded:

> Thus, in a "consumer expectations" analysis, for a plaintiff to recover, the defect in a product which causes his injuries must not be one which the plaintiff, as an ordinary consumer, would know to be unreasonably dangerous to him. In other words, if the plaintiff, applying the knowledge of an ordinary consumer, sees a danger and can appreciate that danger, then he cannot recover for any injury resulting from that appreciated danger.

617 So.2d at 254.

The Court then set out the analysis that is to be conducted under "risk-utility."

> Thus, even if a plaintiff appreciates the danger of a product, he can still recover for any injury resulting from that danger provided that the

> utility of the product is outweighed by the danger that the product creates.

Id. at 254. The Court then held:

> . . . we hold, necessarily, that the "patent danger" bar is no longer applicable in Mississippi. Under a "risk-utility" analysis, the "patent danger" rule does not apply. In "risk-utility," the openness and obviousness of a product's design is simply a factor to consider in determining whether a product is unreasonably dangerous. (citations omitted)

Id. at 256, fn.4.

Under either analysis, "consumer expectations" or "risk utility," the jury has to make the same basic finding, that is that the product was in "a defective condition unreasonably dangerous." Restatement (Second) of Torts §402A. The theory is the same. The only difference is the analysis.

Under the instructions given by the Court to the jury at the trial of this case, the jury had to find that the motorcycle was in "a defective condition unreasonably dangerous" and further had to find that the danger was not "open and obvious." The consumer expectations analysis was a far stricter test or standard for plaintiff to meet and prove than would have been the standard or test under "risk-utility."[15] This Court is of the opinion that

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[15] Plaintiff argues that *Prestage* does not do away with the "consumer expectations" analysis – that it merely gives the plaintiff an option of traveling under the less strict "risk-utility" analysis. The Court, for the reasons stated in this section, does not reach this argument.

since the case was submitted on the stricter theory of Mississippi law, which was requested by defendants, that defendants have no basis to object. *See Gonzalez v. Ysleta Indep. School Dist.*, 966 F.2d 745 (5th Cir. 1993) (case submitted to the jury under a higher standard of care, not reversible error).

Defendant has cited no authority whereby a party can contend for a stricter standard, win on that issue, and then come back and obtain a new trial because the jury was instructed on a stricter standard as requested and contended for by that party. The Court has found no authority to that effect. Defendants requested this Court to submit this case to the jury under the "consumer expectations" analysis. The Court did what defendants requested. Under the facts of this case, defendants cannot now come back and obtain a new trial on the basis that the Court committed error in granting instructions requested by Defendant. If that could be done, litigation would never end. When a party requests an instruction and obtains it, that party can set aside a jury verdict and get a new trial because such instruction was erroneous only if it was "plain error." *See Litherland v. Petrolane Offshore Const. Services*, 546 F.2d 129, 133, fn. 4 (5th Cir. 1977). "Plain error" is error which rises to the level of a manifest injustice or a fundamental miscarriage of justice. *See Bissett v. Ply-Gem Industries, Inc.*, 533 F.2d 142 (5th Cir. 1976).[16]

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[16] "As a general rule, an appellant cannot assign as error the trial court's failure to give an instruction which was not requested." *Bissett*, 533 F.2d at 145. *See also, Herman v. Hess Oil Virgin Islands Corp.*, 524 F.2d 767, 772, fn. 15 (3d Cir. 1975)

In analyzing the facts of this case and the theory and analysis under which it was presented to the jury, this Court concludes that no manifest injustice will result in not granting the defendants' Motion for New Trial. Defendants lost under an analysis more strict than the analysis they were entitled to present to the jury. Defendants have not demonstrated a "manifest injustice" nor a "fundamental miscarriage of justice."

CONCLUSION

The Court having responded to all issues and arguments addressed to the Court by the parties, and having responded to all matters directed to its attention by the remand from the Fifth Circuit and having concluded that it is immaterial whether House Bill 1270 codified Mississippi law as it existed prior to *Prestage*, that House Bill 1270 has no effect on this case, that *Prestage* abolishes "open and obvious" as a total bar to recovery in products liability cases, that *Prestage* controls this case, that the application of *Prestage* will not result in manifest injustice to defendants, that the *Prestage* decision precludes summary judgment in this case, that the Defendants' Second and Supplemental Motion for Judgment Notwithstanding the Verdict should be stricken, and that defendants are not entitled to a new trial, the Court reaffirms the judgment previously entered in this matter and it is so ordered.

(reversal not required for failure to charge jury on a legal theory not requested by any of the parties).

SO ORDERED AND ADJUDGED this the 21st day of June, 1994.

/s/ Charles W. Pickering
CHARLES W. PICKERING, SR.
UNITED STATES
DISTRICT JUDGE

James C. SATCHER, Plaintiff-Appellee,

v.

HONDA MOTOR COMPANY, LTD., And Its Wholly Owned Subsidiaries, American Honda Motor Company, Inc., and Honda R & D Co., Ltd., Defendants-Appellants.

No. 91-7138.

United States Court of Appeals,
Fifth Circuit.

May 28, 1993.

Linda J. Hamilton Mowles, Lewis, King, Krieg & Waldrop, Knoxville, TN, Tere R. Steel, Ronald G. Peresich, Page, Mannino & Peresich, Biloxi, MS, for defendants-appellants.

Ray Ferrero, Jr., Joanne Fanizza, Ferreroo [sic] & Middlebrooks, Ft. Lauderdale, FL, for Satcher.

Wilton L. Strickland, Ft. Lauderdale, FL, Peter K. Smith, Quitman, MS, Robert E. Arceneaux, Mack E. Barham, Lee A. Archer, Barham & Markle, New Orleans, LA, for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Mississippi.

(Opinion January 25, 5th Cir., 1993
984 F.2d 135)

Before JOLLY and DUHÉ, Circuit Judges, and PARKER*, District Judge.

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* Chief Judge of the Eastern District of Texas, sitting by designation.

ON PETITION FOR REHEARING &
SUGGESTION FOR REHEARING EN BANC

E. GRADY JOLLY, Circuit Judge:

The original opinion in this matter was issued by the panel on January 25, 1993. A petition for panel rehearing and a petition for rehearing *en banc* are currently pending before the court. The petition for *en banc* rehearing is DENIED, no judge in active service having requested that the court be polled. The petition for panel rehearing is GRANTED. In view of recent developments in the law governing products liability in Mississippi, we now VACATE our original opinion and REMAND the case to the district court for further consideration in the light of these developments.

On March 5, 1993, the Mississippi state legislature enacted House Bill 1270, codifying various elements of Mississippi common law regarding products liability. On March 25, 1993, the Mississippi Supreme Court issued its opinion in *Sperry-New Holland v. Prestage*, 617 So.2d 248 (Miss.1993) holding that, contrary to prior Fifth Circuit opinions and this panel's opinion in the instant case, Mississippi applies a "risk-utility" analysis in products liability cases and has done so since 1987. These events, occurring subsequent to the panel opinion in this case but while petitions for rehearing were pending before the court, have the potential to alter drastically Mississippi's products liability law.

The appellants argue, in response to the petition for rehearing, that *Sperry-New Holland* should not be applied to this case because doing so would result in manifest injustice to the parties, that the risk-utility standard does

not preclude summary judgment in this case, and that House Bill 1270 codifies Mississippi law as it existed pre-*Sperry-New Holland* and changes procedures relative to punitive damage awards. The district court, with its extensive knowledge of the facts and proceedings in this case, is in a far better position than are we to address and to first apply these new arguments, and to apply the newly developed law to the facts of this case. Thus, we vacate our original opinion and remand this case to the district court for further consideration.

Petition for panel rehearing GRANTED; opinion VACATED; and case REMANDED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-7138

JAMES C. SATCHER,

Plaintiff-Appellee,

versus

HONDA MOTOR COMPANY, LTD., And
Its Wholly Owned Subsidiaries,
AMERICAN HONDA MOTOR COMPANY, INC.,
AND HONDA R & D CO., LTD.,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Mississippi

(CA-S-87-0635-P)

(Filed Jan. 25, 1993)

Before JOLLY and DUHÉ, Circuit Judges, and PARKER, District Judge.*

E. GRADY JOLLY, Circuit Judge:**

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* Chief Judge of the Eastern District of Texas, sitting by designation.

** Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes

James C. Satcher was riding a Honda motorcycle when he was struck by an automobile that traumatically amputated his leg. He sued Honda under theories of strict product liability and negligent product design, asserting that the motorcycle was defective and unreasonably dangerous because it lacked leg guards. He also alleged that the design was defective because the motorcycle was not readily conspicuous to oncoming motorists. Honda countered by moving for summary judgment on the basis that Mississippi's "open and obvious" doctrine barred recovery and that the motorcycle's "inconspicuity" was not causally related to Satcher's injuries. The district court denied Honda's motion for summary judgment and allowed Satcher's case to proceed to trial. The jury returned a verdict for Satcher in the amount of $3,017,000. Honda Motor Co., Ltd., American Honda Motor Co., Inc., and Honda R & D Co., Ltd. (collectively "Honda") appeal. We hold that under the applicable Mississippi law, the consumer expectations test applies in product liability cases, and because the alleged defect as well as the danger was open and obvious to the ordinary consumer, the motorcycle was not "unreasonably dangerous." Similarly, because the danger was open and obvious to a casual observer, Satcher is barred from recovery in his negligence claim. Furthermore, the motorcycle's alleged "inconspicuity" could not have caused Satcher's injuries, and, because there is no causal relationship, the "inconspicuity" claim fails. For the reasons

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needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

set out below, we REVERSE the district court's judgment and RENDER judgment in favor of all defendants.

I

Before addressing the merits of this appeal, we must deal with the procedural issues it presents. Satcher argues that because Honda did not move for a directed verdict either after Satcher presented his case or at the close of its case, and because it moved for a new trial and did not ask for JNOV, the district court's denial of summary judgment is moot and thus beyond review. Furthermore, Satcher argues that because the jury returned a verdict for Satcher after it was properly instructed on the "open and obvious" defense, we are precluded from finding that no reasonable jury could have found that the defect and danger presented by this motorcycle's lack of leg protection were not open and obvious. Similarly, Satcher argues that the jury's verdict supports his "conspicuity" claim and it cannot now be revisited.

Honda's motion for a new trial was understood by the trial judge to include a motion for JNOV, including the argument that the defendants were entitled to summary judgment At the hearing on the defendants' motion for new trial, the trial judge specifically commented on this aspect of Honda's motion[1] and repeated and

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[1] "Now, at the top of Page 3, Item 4 [of Defendants' Motion for New Trial], you again bring up open and obvious defense, and you say to a casual observer or to any ordinary consumer, *which again is bringing back the issue of the Court's ruling on the motion for summary judgment.*" (Emphasis ours.) Transcript of 5/20/91 hearing on defendants' motion for new trial, p.57.

readopted his denial of Honda's motion for summary judgment.

It is well established that notices of appeal, with some few specific exceptions, are to be read liberally. *Foman v. Davis*, 371 U.S. 178, 181-82, 83 S.Ct. 227, 230 (1962), *McLemore v. Landry*, 898 F.2d 996, 999 (5th Cir. 1990). Consequently, we must read Honda's notice of appeal as placing before us each of the trial court's adverse rulings against Honda, including its denial of summary judgment to Honda. *See Moore's Federal Practice* § 203.17[2] (appeal from final judgment draws into question and allows attack on all prior non-final orders and all rulings that produced judgment); *Blizstein v. Ford Motor Co.*, 288 F.2d 738 (5th Cir. 1961).

In reviewing the trial court's ruling on summary judgment, this court applies the same standard as the trial court, viewing the facts in the light most favorable to the nonmoving party. *Federal Deposit Ins. Corp. v. Hamilton*, 939 F.2d 1225, 1228 (5th Cir. 1991). We decide questions of law *de novo*. *Walker v. Sears, Roebuck & Co.*, 853 F.2d 355, 358 (5th Cir. 1988). Summary judgment is proper if the pleadings, depositions, admissions, and other summary judgment evidence demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986); *Brown v. Southwestern Bell Tel. Co.*, 901 F.2d 1250, 1255 (5th Cir. 1990).

II

In reversing and rendering, it appears necessary for us to point out that district courts are, in diversity cases, bound by the decisions of the forum state. *Erie R.R. Co. v. Tomkins*, 304 U.S. 64, 58 S.Ct. 817 (1938); *Grenada Steel Industries, Inc. v. Alabama Oxygen Co.*, 695 F.2d 883, 885 (5th Cir. 1983). Furthermore, under the doctrine of *stare decisis*, the district court is bound by the prior decisions of this court in interpreting Mississippi law. The trial judge failed to recognize these principles in denying summary judgment to Honda. For example, although the district court stated that *"[t]he open and obvious defense is still alive and well under Mississippi law* even though this Court feels it should be subsumed by the comparative negligence doctrine," (emphasis ours), *Satcher v. Honda Motor Co.*, 758 F.Supp. 393, 396 (S.D. Miss. 1991), it proceeded to apply the open and obvious defense based on holdings from the Seventh Circuit and other foreign jurisdictions, using a subjective standard. This burst of inspired creativity directly contravened our holding in *Melton v. Deere & Co.*, 887 F.2d 1241, 1243-44 (5th Cir. 1989), and the Mississippi law upon which *Melton* is based. Notwithstanding the judge's belief that there are good policy reasons for his approach, he was not free to apply his *ex cathedra* approach.

For the reasons set out in *Toney v. Kawasaki Heavy Industries*, 975 F.2d 162 (5th Cir. 1992), we reverse the district court's judgment entered upon the jury verdict in this case. As a matter of law, Satcher stated no claim against Honda. Under the applicable Mississippi law, the consumer expectations test applies in product liability cases, and because the alleged defect and danger were

open and obvious to the ordinary consumer, the motorcycle was not "unreasonably dangerous." Similarly, because the danger was open and obvious to a casual observer, Satcher is barred from recovery in his negligence claim. Furthermore, the motorcycle's alleged "inconspicuity" could not have caused Satcher's injuries, and, because there is no causal relationship, the "inconspicuity" could fails.[2] The district court erred in failing to grant Honda's motion for summary judgment. This case should never have gone to trial. The judgment of the district court is REVERSED and judgment for defendants is herewith RENDERED.

REVERSED and RENDERED.

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[2] Satcher additionally sued Honda on the theory that the motorcycle was unreasonably dangerous because Honda failed to manufacture it in such a way that it was adequately conspicuous to other vehicles. Even assuming the merit of this argument, the evidence shows that Mrs. Fagan, the driver of the automobile that collided with Satcher, first saw the motorcycle from a distance and thought it was a child playing in the road. *Satcher*, 758 F.Supp. at 393-94. It is therefore clear that Fagan recognized the motorcycle as an object that she should approach with care and attempt to evade. At the time of impact, Mrs. Fagan's automobile was "either stopped or barely moving." *Satcher*, 758 F.Supp. at 394. Yet she still turned her car into the plaintiff's lane of traffic; indeed, she turned her car directly in front of the plaintiff's motorcycle. The plaintiff's motorcycle could not have been any more conspicuous at this point. There is simply no causal connection between the motorcycle's "inconspicuity" and Mrs. Fagan's collision with it. As a matter of law, causation is lacking and this claim fails.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-7138

JAMES C. SATCHER,

Plaintiff Appellee,

versus

HONDA MOTOR COMPANY, LTC.,
And Is Wholly Owned Subsidiaries,
AMERICAN HONDA MOTOR COMPANY, INC.,
and HONDA R & D COMPANY, LTD.,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Mississippi

(Filed Jan. 25, 1993)

Before JOLLY and DUHÉ, Circuit Judges, and PARKER*, District Judge.

BY THE COURT:

IT IS ORDERED that appellee's motion for certification of questions to the Mississippi State Supreme Court is DENIED.

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* Chief Judge of the Eastern District of Texas, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

JAMES C. SATCHER — PLAINTIFF

VERSUS — CIVIL ACTION NO. S87-0635(P)

HONDA MOTOR CO., LTD.
AMERICAN HONDA MOTOR
CO., INC. AND HONDA
RESEARCH AND DEVELOPMENT
CO., LTD. — DEFENDANTS

ORDER ON DEFENDANTS' MOTION FOR NEW TRIAL

(Filed Sep. 24, 1991)

This matter is before the Court on Defendants' Motion for New Trial pursuant to Rule 59 of the Federal Rules of Civil Procedure, and the Court, having conducted a hearing thereon and having reviewed the briefs of the parties, the authorities cited and being fully advised in the premises, finds as follows, to-wit;

This matter was tried before a jury commencing February 11, 1991, and concluded with a verdict in favor of the Plaintiff in the amount of $1,012,000.00 actual damages and $2,000,000.00 punitive damages on February 22, 1991. The Court entered judgment on the verdict in the amount of $2,985,350.00 after allowing a credit to the Defendants in the amount of $26,650.00 for a pre-trial settlement received by the Plaintiff.

The Defendants, as the main basis of their motion for new trial, have requested the Court to revisit its decision denying the Defendants' summary judgment motion. Out

of an abundance of fairness, the Court has done so and is still confident that its denial of that motion was just and proper. The Court was, and still is, of the opinion that there were genuine issues of material fact regarding the issues that Defendants raised in their motion that could only be submitted to the jury as the trier of the facts, thus precluding summary judgment. This Court will not reiterate its position on any of the issues decided in the opinion denying Defendants' motion for summary judgment, but will let that opinion stand. The Court will address each of the issues presented by the Defendants in support of their motion for new trial not discussed in the opinion denying summary judgment.

The Defendants' [sic] assert that the verdict was against the overwhelming weight of the credible evidence. Where there is a conflict in substantial evidence, a jury question is created. *See Boeing Company v. Shipman*, 411 F.2d 365 (5th Cir. 1969). This Court is of the opinion that there was a conflict in substantial evidence. This trial lasted for eight trial days. There was voluminous testimony presented by both parties by way of lay witnesses, expert witnesses, video and transcribed depositions, video tests and feasibility studies and extensive use of demonstrative exhibits including the motorcycle itself involved in the crash. There was substantial evidence to support the jury's verdict on all issues.

The Defendants' [sic] try to pick apart the verdict on individual issues comprising the Plaintiff's overall claim. However, the Defendants' [sic] did not request a special verdict nor did they request interrogatories be presented to the jury. The Defendants, in fact, agreed to the form of the general verdict returned. Defendants now request this

Court to do what they assert the jury did; namely to speculate and conjecture as to the possibility of the jury's improper application of the law to the facts of this case. Suffice it to say that there was substantial evidence presented to support the jury's verdict on all issues.

As regards the Defendants' assertions that the jury was improperly instructed on the standard for judging whether the alleged defects to the motorcycle were "open and obvious", this Court would point out that there were no less than three instructions which set forth the "consumer expectations test" as being the proper objective standard for the jury to apply. *See* Instructions D-4, D-14 and P-13.

Defendants assert that they should have been granted a directed verdict or a peremptory instruction on Plaintiff's conspicuity claim because the "uncontroverted testimony" was that Fannie Fagan saw the Plaintiff's motorcycle prior to the crash. Fagan did not testify and the Court is not aware of any proffer of Fagan's testimony on this point. The Court did, however, review Fagan's deposition prior to rendering its decision on the summary judgment motion. That testimony was equivocal, at best. Fagan did state she saw the motorcycle – and thought it was a child playing in the road. She did not recognize it as a motorcycle until the crash was imminent. If anything, this testimony would have bolstered Plaintiff's conspicuity claim because the idea of conspicuity is to create a conspicuousness so that people confronted with a motorcycle will recognize it as such immediately. There was, therefore, a conflict in substantial evidence which created a jury issue on the conspicuity claim. *Boeing Company v. Shipman, supra.* What role this claim played in the jury's

verdict can only be arrived at by speculation and conjecture because the Defendants' [sic] did not request a special verdict nor did they request interrogatories be presented to the jury.

The Defendants next assert that the Court erred in refusing to instruct the jury on assumption of the risk. Where assumption of the risk overlaps and coincides with contributory negligence, the rules of contributory negligence are applicable. Virtually the only time assumption of the risk applies is when the injured party's own negligence was the sole proximate cause of his injuries. *Braswell v. Economy Supply Company,* 281 So.2d 669 (Miss. 1973). This Court is of the opinion that there was substantial evidence that the Plaintiff's injuries were caused by means other than his own negligence and that the jury was properly instructed on contributory negligence. *See* Instruction P-11.

The Defendants' next contention is that the Court erred in not instructing the jury that the Defendants were liable only for any enhancement injuries to the Plaintiff; i.e. any increase in injuries suffered as a result of any defect in the motorcycle which caused it to be unreasonably dangerous to the Plaintiff. Mississippi has not spoken to this issue, directly. However, it is well settled that a tort-feasor is liable only for the injuries proximately caused by him. The jury was, in fact, instructed that the Plaintiff had to prove, by a preponderance of the evidence and with a reasonable medical certainty, that any damages claimed by him were proximately caused by the Defendants. Absent a stricter standard in Mississippi

which would require the Plaintiff to prove with specificity his enhanced injuries, injury is a question of proximate cause. The jury was properly instructed on proximate cause.

As to Plaintiff's instructions to which Defendants' [sic] assert error, the Court would note that the Defendants did not object to a number of them at the time they were offered and thus have no basis to object to them now. Defendants specifically object to the punitive damages instruction. This instruction was actually offered by the Defendants and was adopted by the Plaintiffs as P20. There was substantial evidence to support the jury verdict of punitive damages. The instruction on punitive damages is a correct statement of the standard for awarding such damages. *See South Central Bell v. Epps,* 509 So.2d 886 (Miss. 1987); *Fowler Butane Gas Co. v. Varner,* 141 So.2d 226 (Miss. 1962); *Scott v. Transport Indemnity Co.,* 513 So.2d 889 (Miss. 1987); and *Planters Wholesale Grocery v. Kincade,* 50 So.2d 578 (Miss. 1951).

The Court is of the opinion that when all the instructions are read as a whole, the jury was properly instructed on all issues and Defendants' contentions to the contrary are without merit.

Defendants' [sic] next contend that the Court erred in overruling a prior order of Magistrate Singletary, *in limine,* regarding the production of defense expert witness fees. Magistrate Singletary's order dealt with the production of canceled checks or other documents over a twenty year period indicating fees received by the witnesses for the Defendants. The Magistrate denied Plaintiff's motion to compel production of these documents on the basis

that it would be oppressive and burdensome and due to the fact that the Plaintiff had received such information through other means of discovery. After receiving Plaintiff's *in limine* request for production of such fee information over a period of the previous five years, the Court reviewed the Magistrate's order and all discovery produced on the subject. The Court found that the Defendants' [sic] had failed to produce one iota of information regarding such fee information any further was of the opinion that this exact *in limine* issue was not previously addressed in Magistrate Singletary's order. Such information is necessary and admissible to infer bias of the witness, as recognized in Magistrate Singletary's order. Defendants' contention that this unduly prejudiced them is without merit.

Defendants' [sic] next contend that the Court admonished Defense Counsel Lewis in front of the jury about the improper use of a letter from Harley-Davidson to the City of Milwaukee police department. After a careful review of the record in this matter, the Court has come to the conclusion that Defendants' contentions are completely without merit. The record clearly shows that the discussion about the Harley-Davidson letter was at a bench conference out of the hearing of the jury. The Court did give a precautionary instruction to the jury about the contents of the letter without objection from either party. This instruction was given in conformity with an *in limine* order secured by the Defendants regarding the results of other jury verdicts in motorcycle crash cases.

As regards Defendants' assertions that the Court improperly injected its own views into the trial when it objected to a video depicting a prior scientific crash, the

Court would point out that it first excused the jury before questioning Defense Counsel as to the purpose of the film. The Court would further point out that Defense Counsel was at a considerable loss as to the reason for the admissibility of the video until suggested by the Court. In any event, the Court has an ongoing duty to see that trials are conducted in accordance with the rules of evidence and civil procedure. The Court will not shirk from this obligation to monitor and control the trial. It did and will continue to conduct trials in an orderly and proper manner while disrupting proceedings as little as possible. But if it is necessary to stop a trial to determine the admissibility of a questionable piece of evidence, even without objection, the Court is duty bound to do so. Defendants' other contentions as to the Court's control of the trial are without merit.

Defendants next contend that it was error for the Court to exclude evidence of the Plaintiff's propensity to speed on the road where he was injured. Defendants' [sic] offered such testimony pursuant to Rule 406, Fed.R.Evid., to show custom or habit. Based on the Court's review of the evidence offered by the one live witness offered by the Defendants and the very convoluted proffer of two other witnesses, the Court is of the opinion that it was properly excluded as not rising to the level necessary to be admissible under Rule 406 to establish a custom or habit of speeding.

As regards the Defendants' claim that the Court incorrectly excluded evidence of the Plaintiff's previous felony convictions by sustaining Plaintiff's *in limine* motion, the Court would call Defendants' attention to its *in limine* ruling of February 11, 1991, which ruling was

signed by Counsel for Defendants. That ruling specifically provided that the " . . . Court will rule on this matter at the time of trial." Defendants did not offer any evidence of prior convictions and this argument is therefore precluded.

Defendants' other contentions as to the Court's evidentiary rulings are without merit.

At the hearing on this motion on May 20, 1991, the Defendants made certain allegations as to errors in the daily copy transcript. The Court would note that the Defendants failed to follow the proper procedure for informing the Court Reporter of these alleged errors and waited to state such allegations on the record at the time of the hearing. This put the Court Reporter at a distinct disadvantage in that she was unable to verify the daily copy transcript until after the hearing. The Court directed all Counsel to supplement their briefs with specific references to the daily copy transcript and to point out any of the alleged errors. None were forthcoming nor was the Court Reporter requested by counsel to verify any part of the transcript. Therefore the Court can only conclude that the transcript is complete and any insinuations to the contrary are without merit. All Counsel are urged to use the proper procedure to question records in the future.

The Court, having reviewed the Defendants' Motion for New Trial and finding it to be without merit, it is therefore OVERRULED, AND IT IS SO ORDERED.

SO ORDERED AND ADJUDGED this the 23 day of SEPTEMBER, 1991.

/s/ Charles W Pickering Sr
CHARLES W. PICKERING, SR.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60492

JAMES C. SATCHER,

Plaintiff-Appellee,

versus

HONDA MOTOR COMPANY, ET AL.,

Defendants-Appellants.

Appeal from the United States District
Court for the Southern District of Mississippi

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion 5/30/95, 5 Cir., ___, ___ F.3d ___)

(JULY 24, 1995)

Before POLITZ, Chief Judge, REAVLEY and BARKSDALE, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Judges who are in

regular active service not having voted in favor, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Thomas M. Reavley
United States Circuit Judge

REHG-4
Rev. 1/4/95

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

JAMES C. SATCHER — PLAINTIFF

VERSUS — CIVIL ACTION NO. S87-0635(P)

HONDA MOTOR CO., LTD.,
AMERICAN HONDA MOTOR CO., INC.,
AND HONDA RESEARCH AND
DEVELOPMENT CO., LTD. — DEFENDANTS

JUDGMENT ON JURY VERDICT

(Filed Feb. 27, 1991)

This action came on for trial before the Court and a jury, Honorable Charles W. Pickering, Sr., District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, it is

ORDERED AND ADJUDGED:

1. That the Plaintiff, James C. Satcher, recover of and from the Defendants, Honda Motor Co., Ltd., American Honda Motor Co., Inc., and Honda Research and Development Co., Ltd., the sum of ONE MILLION TWELVE THOUSAND AND NO/100 DOLLARS ($1,012,000.00) in actual damages, TWO MILLION AND NO/100 DOLLARS ($2,000,000.00) in punitive damages, for a total judgment of THREE MILLION TWELVE THOUSAND AND NO/100 DOLLARS ($3,012,000.00), less and except the sum of TWENTY SIX THOUSAND SIX HUNDRED AND FIFTY AND NO/100 DOLLARS ($26,650.00) which was received by the Plaintiff in a pre-trial settlement with Fannie Fagan, for a net Judgment in favor of the Plaintiff in the amount of TWO MILLION

NINE HUNDRED EIGHTY FIVE THOUSAND THREE HUNDRED FIFTY AND NO/100 DOLLARS ($2,985,350.00) with interest thereon at the rate of 6.21 per cent as provided by law, for which sum let execution issue.

2. That Plaintiff be granted leave to file a Motion to Tax Costs, which must be filed within fifteen (15) days of entry of this Judgment, and the issues to be determined after the matter is fully briefed.

DATED at Biloxi, Mississippi, this 27th day of February, 1991.

/s/ CHARLES W. PICKERING, SR.
U.S. DISTRICT JUDGE

UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

JAMES C. SATCHER — PLAINTIFF

VERSUS — CIVIL ACTION NO. S87-0635(P)

HONDA MOTOR CO., LTD.
AMERICAN HONDA MOTOR CO., INC.
and HONDA RESEARCH AND
DEVELOPMENT CO., LTD. — DEFENDANTS

MOTION FOR NEW TRIAL

(Filed Mar. 8, 1991)

COME NOW the Defendants, Honda Motor Co., Ltd., American Honda Motor Co., Inc., and Honda R & D Co., Ltd. (hereinafter "Honda"), and pursuant to Rule 59 of the Federal Rules of Civil Procedure, move the Court for a new trial and in support thereof would show unto the Court the following, to-wit:

I.

A jury trial of this cause commencing on February 11, 1991, and concluding on February 22, 1991, resulted in a jury verdict in favor of the Plaintiff and against Honda, in the amount of $1,012,000.00 in actual damages and $2,000,000.00 in punitive damages.

II.

On February 27, 1991, the Court allowed Honda a credit in the amount of $26,650.00 for a pre-trial settlement received by the Plaintiff and rendered Judgment in favor of the Plaintiff in the amount of $2,985,350.00.

III.

Said jury verdict and Judgment should be set aside and a new trial granted to Honda based upon the following grounds:

A. The verdict and Judgment were against the weight of the credible evidence.

1. Plaintiff's claims based upon strict liability, negligence, and breach of implied warranty were not supported by sufficient evidence. The evidence was overwhelmingly in favor of Honda on each of these causes of action.

2. Plaintiff's claim for punitive damages should not have been submitted to the jury because there was no evidence from which a fair minded jury could have concluded that Honda acted with gross negligence or willful misconduct in designing, selling, or marketing the motorcycle purchased by Plaintiff as required by Mississippi law.

3. The amount of actual damages awarded to the Plaintiff was in excess of the amount sought by Plaintiff's counsel in their closing argument, and, as such, constitutes proof that the jury did not restrict their verdict to the damages proximately caused by the alleged acts and omissions of Honda and further, that the jury

did not reduce the amount of Plaintiff's actual damages by a percentage of Plaintiff's obvious contributory negligence in operating his motorcycle no farther than two feet from the center line while approaching an oncoming four thousand pound automobile.

4. The defects attributed to the motorcycle were conditions which were open and obvious to a casual observer, or to any ordinary consumer, and therefore, Defendants were, as a matter of law, entitled to a verdict in their favor on each of Plaintiff's causes of action.

5. The verdict reflects that the jury did not correctly apply Mississippi law on the issues of crashworthiness, negligence, strict products liability, and warranty and the defenses of open and obvious and state of the art.

B. The Court erred in failing and refusing to instruct the jury in the following respects:

1. The Court should have instructed the jury that the standard for judging whether the alleged defects in the motorcycle were open and obvious was an objective standard to be measured by the knowledge of the ordinary consumer and not by the Plaintiff's knowledge. *See* Honda's proposed instruction D-15.

2. The Court should have instructed the jury that a verdict for Honda was required on Plaintiff's conspicuity claim if the proof showed by a preponderance of the evidence that Mrs. Fagan saw the motorcycle before the accident between Plaintiff and Mrs. Fagan occurred. *See* Honda's proposed instruction D-13. Because the proof was uncontradicted that Mrs. Fagan actually saw the Plaintiff's motorcycle, recognized it as a motorcycle and

stopped her car before the Plaintiff impacted her car, there was, as a matter of law, no causal causation between the conspicuity of the motorcycle and the Plaintiff's injuries. Defendant should have been given a directed verdict and/or a peremptory instruction on Plaintiff's conspicuity claim.

3. The Court erred in refusing to instruct the jury on the defense of assumption of the risk. *See* Honda's proposed instruction D-10. Evidence of Plaintiff witnesses Bozeman and Cranford put the impact between the motorcycle and the Fagan automobile in the car's proper lane of travel, on the automobile's side of the road, near the center line, and the Defendants' witnesses Snider and Riley put the Plaintiff's speed at least at 50 m.p.h. at the time of the accident.

4. The Court erred in refusing to instruct the jury that compliance with federal safety standards constituted strong and substantial evidence that the motorcycle was not defective. *See* Honda's proposed instruction D-45.

5. The Court failed to instruct the jury that punitive damages could not be awarded in the absence of clear and convincing evidence of the Plaintiff's entitlement to them. *See* Honda's proposed instruction D-43.

6. The Court failed to instruct the jury that Plaintiff's recovery was limited to damages for any enhanced injuries suffered by Plaintiff, and further, that the burden of proving that Plaintiff suffered enhanced damages was on the Plaintiff. *See* Honda's proposed instructions D-26, D-31, D-32, and D-33.

C. The Court erred in instructing the jury in the following respects:

1. The Court instructed the jury that they could render a verdict for Plaintiff on his breach of implied warranty of merchantability claim without a finding in favor of Plaintiff on all elements of the claim required under Mississippi law. This instruction to the jury, P-15, could easily have misled the jury into believing that they could find for the Plaintiff on this claim without the Plaintiff having established all the necessary elements.

2. The jury was instructed that to find for Plaintiff on Plaintiff's crashworthiness claim they merely had to find that Plaintiff was using the motorcycle for its intended use at the time of the accident. The jury was not instructed that in order to render a verdict in Plaintiff's favor, they had to find that Plaintiff proved all elements of a crashworthiness cause of action. *See* instruction P-9.

3. The Court did not instruct the jury that Plaintiff's recovery from Honda on his strict liability, negligence, and breach of warranty claims should be limited to damages for enhanced injuries suffered by Plaintiff. *See* P-13, P-16, P-11, P-19.

4. The Court erroneously instructed the jury that they could award punitive damages against Honda.

D. During the course of the trial, the Court made a number of remarks and rulings regarding Honda, Honda's expert witnesses, and one of Honda's defense counsel regarding the following subject matter which prejudiced Honda:

1. The Court inappropriately overruled an earlier order entered by Magistrate Britt R. Singletary which specifically provided that Defendants were not obligated to supply further information regarding defense expert witness fees. Even though Magistrate Singletary's ruling was not appealed by Plaintiff, and according to the Court's rules it had become final, the Court overruled the Magistrate's Order on the first day of trial and ordered the Defendants to provide this information regarding their expert witnesses at a time when the experts were not readily available and specific, precise information could obviously not be obtained.

2. The Harley Davidson letter was listed as an exhibit on Defendants' exhibit list in the Pretrial Order and since counsel for Plaintiff had not objected to it, its admissibility was stipulated to pursuant to the terms of the Pretrial Order. Notwithstanding this stipulation, after a portion of the letter was read in cross-examination to one of Plaintiff's expert witnesses, Dr. Arthur Ezra, by Honda's counsel Charles B. Lewis, the Court, on its own initiative and without any prior objection from the Plaintiff's counsel, admonished Mr. Lewis in front of the jury that he had inappropriately used this exhibit. This remark from the Court not only discredited defense counsel Lewis in the eyes of the jury, but also discredited a substantial piece of evidence which up to that time almost totally impeached the foundation for Plaintiff's expert witness's testimony that a particular type of leg protective device could be effectively employed.

3. During the Defendants' direct examination of its expert witness Warner Riley, defense counsel Lewis was showing the witness and the jury a video tape of

prior scientific crash testing performed under contract by Plaintiff's experts Ezra and Peterson. The video tape had been listed as an exhibit in the Pretrial Order by both Plaintiff and Defendants and no objections had been made by Plaintiff to its admissibility. By the terms of the Pretrial Order the admissibility of this exhibit had thus been stipulated. Without objection or prompting by Plaintiffs counsel, the Court, on its own initiative, while seated near the jury and viewing the video, objected to said video tape on the basis that it had no relevance to this case because of the differences in the angles of the collisions. The Court objected to this video offered by the Defendants even though no such objection was made by the Court to the Plaintiff's introduction of a film which depicted collisions with angles different than the subject case. These remarks by the Court were made so as to also have the same effect, in the jury's mind, on the Defendants' other scientific video exhibits which were a substantial part of the defense presented. The Court unfairly injected its own opinions into the matter at this crucial point, and again caused the jury to question the credibility of the Defendants' exhibit, its expert witness, and its counsel, thus inexorably dooming all hopes of a fair jury weighing the facts of this case.

4. The Court, on its own initiative and without objection by Plaintiff's counsel, admonished Honda's counsel Charles B. Lewis numerous times during examination of witnesses that his questions and method of examination were improper.

5. Prior to the reading of the deposition of Takenori Yamamoto in Defendants, case in chief, the Court remarked that it was not a good idea to allow the

presentation of such depositions, which the Court characterized as being the deposition of a company representative, when the representative was not present to testify in Court. This remark was made despite the fact that Mr. Yamamoto had not been designated as Defendants' corporate representative, and that Plaintiff was permitted to read and present a number of expert witness depositions without incurring any comment or criticism from the Court.

E. The Court erred by excluding and prohibiting the Defendants from presenting evidence from C. J. Cranford, Fannie Fagan and Charlie Fagan, who, if permitted to testify, would have each testified that prior to the date of the accident they had witnessed James Satcher operating his motorcycle at excessive rates of speed in and around the Stonewall, Mississippi area, and specifically on River Road. This evidence was admissible under Rule 406 of the Federal Rules of Evidence to prove the Plaintiff's custom and habit of operating his motor vehicle in an unsafe manner. This evidence was relevant not only to the issue of Plaintiff's speed at the time of the accident in question, but also to Plaintiff's claim that the motorcycle was defective due to a lack of conspicuity.

F. The Court incorrectly excluded evidence of the Plaintiff's previous felony arrests and convictions by sustaining Plaintiff's motion *in limine* and thereby precluding the Defendants from presenting evidence that the Plaintiff had been arrested for and pled guilty to two felonies, possession of marijuana and receiving stolen property.

G. The Court erred in failing to grant a directed verdict and/or a peremptory instruction on the issue of punitive damages in favor of Defendants. Considering the evidence presented at trial in the light most favorable to Plaintiff, the testimony at best showed a disagreement as to whether engineering standards had progressed to the point where it could be safely said that a leg protective device would provide more protection than harm. There was no definitive evidence offered by Plaintiff that in all situations or even in most collision situations that leg protective devices could protect the operator's extremities without causing increased risk of other more serious injuries than the operator would have suffered had the motorcycle not been equipped with such a device. Plaintiff presented no evidence of gross negligence or intentional misconduct on the part of the Defendants and in the absence of such, the refusal of a directed verdict and/or peremptory instruction on the issue of punitive damages was in error.

H. The Court erred in failing to grant a directed verdict and/or peremptory instruction in favor of Defendants on Plaintiff's conspicuity claim, since it was uncontradicted that Mrs. Fagan saw the motorcycle prior to the impact. Thus, there was no proximate cause between the Plaintiff's injuries and the motorcycle's conspicuity or lack thereof. In support of the alleged defect, Plaintiff's proof was limited to testimony that the Plaintiff's experts thought the lighting and reflector configuration should have been in an inverted triangular form. Such testimony was insufficient to establish the existence of a defect and causation between the defect and the injuries Plaintiff suffered.

I. The Court erred in permitting Dr. Ezra, the Plaintiff's expert witness, to testify that the United States government did not adopt the recommendations of the DRI Contracts because the political "climate" in Washington, D.C. was not right at the time, that the atmosphere in Washington was for deregulation, that it would be impossible to promulgate motorcycle regulation in the late 1970's and that the industry successfully opposed any such regulation. Dr. Ezra was not qualified to render such an opinion in that area and, as a matter of law, such an opinion unless from a cabinet level source would not have been admissible.

J. The Court erred in denying Defendants' Motion in Limine seeking to preclude the testimony of Kenneth Harms and his presentation to the jury as an expert. The Court further erred in allowing the opinion testimony of Plaintiff's alleged expert witness, Kenneth Harms inasmuch as he was unqualified to render opinions in the area on which he testified, particularly inasmuch as his testimony as to the protection afforded by police bars was totally refuted by all engineering experts from both Plaintiff and Defendants in this case.

K. The Court erred in refusing to allow Honda's expert witnesses Dr. Snider and Mr. Riley to offer opinions as to the location of the point of impact at the time of the accident in question based upon the trial testimony of Ben Bozeman and C. J. Cranford. The Court further erred in excluding the testimony of these experts as to operator error based upon the trial testimony of Ben Bozeman and C. J. Cranford. Such opinion testimony was relevant to Defendants' contributory negligence defense and the exclusion of such testimony was error.

L. The Court erred in denying Honda's expert witnesses Dr. Snider and Mr. Riley the opportunity to testify as to new opinions based on the testimony in the trial record. The Court further erred in its ruling that it would be "unfair" to permit experts to change their opinions after discovery was concluded, particularly in circumstances such as the instant trial in which Plaintiff witnesses Bozeman and Cranford changed their testimony in open court from that given in their discovery depositions as to the location of the point of impact being in the automobile's lane of travel or at the center line which testimony would have shown that Plaintiff had a chance to avoid the accident and which testimony related directly to the question of assumption of the risk, contributory negligence and proximate cause.

M. The submission of this case to the jury does not comport with Mississippi law on the issues of crashworthiness, negligence, strict products liability, warranty, and the defenses of open and obvious and state of the art.

N. The Court erred in the denial of Defendants' Motion in limine seeking to preclude evidence of testing and standards subsequent to July, 1983, the date the subject motorcycle was manufactured. The determination of product defect is to be decided under the standard of the state of the art at the time the product was manufactured; therefore, evidence of actions taken subsequent to the

date of manufacture are irrelevant and should have been ruled inadmissible.

Respectfully submitted,

HONDA MOTOR CO., LTD.
AMERICAN HONDA MOTOR CO., INC. and HONDA R & D CO., LTD.

BY: PAGE, MANNINO & PERESICH
BY: Ronald G. Peresich
Ronald G. Peresich

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(601) 374-2100

CERTIFICATE

I, Ronald G. Peresich, of the law firm of Page, Mannino, & Peresich do hereby certify that I have this day mailed a true and correct copy of the above and foregoing Motion for New Trial to Charles B. Lewis, Esquire, at his usual mailing address of P. 0. Box 2425, Knoxville, TN 37901; Joanne Fanizza, Esquire, at her usual mailing address of P. O. Box 14604, Fort Lauderdale, FL 33302; and Peter K. Smith, Esquire, at his usual mailing address of 103 Dabbs Avenue, Quitman, MS 39355.

This, the 8 day of March , 1991.

/s/ Ronald G. Peresich
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